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Supreme Court, U.S.
FILED

09-141 JUL 30 2009

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No. 09-

IN THE

Supreme Court of the United States

JULIE M. BENNETT,

Petitioner,

v.

VERIZON WIRELESS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Supreme Court addressed the application of the burden-shifting framework set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) to defendants' motions for summary judgment in employment discrimination cases nearly a decade ago when it decided *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Despite the well-established legal standards used by the courts, this area of the law, in particular how courts handle the issues of pretext, is unpredictable, with some judges willing to grant summary judgment in cases that other judges find worthy of trial. This unpredictability is not only within circuits, it is *between* circuits.[1] For example, the Fifth Circuit is notably more willing to send employment cases to the jury, while the Second Circuit essentially continues to apply its *en banc* ruling in *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) for the idea that pretext, standing alone, is not always enough for trial, and has dismissed cases despite a showing of pretext, on one hand,[2] but has permitted other cases to proceed to trial by applying a strong proximity rule to claims that would otherwise fail for insufficient evidence. [3]

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1. *Weinstock v. Columbia University*, 225 F.3d 33 (2d Cir. 2000);*Blow v. City of San Antonio*, 236 F.3d 293 (5th Cir. 2000); *Feingold v. New York*, 366 F.3d 138 (2d Cir. 2004);*Curry v. Menard*, 270 F.3d 473,, 479-80(7th Cir. 2001); *James v. New York Racing Association*, 233 F.3d 149 (2nd Cir. 2000).

2. *Schnable v. Abramson*, 232 F.3d 83 (2nd Cir. 2000).

3. *Cifra v. General Electric Company*, 252 F.3d 205 (2nd Cir. 2001)(the court found that the Plaintiff's discharge a mere 20 days after defendant learned of her discrimination claim was itself "sufficient evidence in the record from which a rational factfinder could conclude that [defendant's] explanation was a pretext for retaliation."

Questions Presented:

1. Did the Second Circuit improperly apply the "pretext plus" standard, overruled in *Reeves*,[4] when it determined Petitioner did not adduce sufficient evidence to defeat Respondent's motion for summary judgment under Fed. R. Civ. P. 56?

2. What kind of evidence is enough to overcome the Respondent's legitimate nondiscriminatory explanation for whatever action it took to allow a jury to infer discrimination under Fed. R. Civ. P. 56?

3. What weight should temporal proximity evidence be given beyond the prima facie case stage under Fed. R. Civ. P. 56?

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4. *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 148 (2000) ("[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.").

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Petitioner sought appeal from a series of judgments of the United States District Court for the Western District of New York (Siragusa, J.). The District Court first issued a decision in Petitioner's favor on September 18, 2007. (App., C-33a-52a). On October 3, 2007, Respondent filed a motion for reconsideration. On January 24, 2008, the District Court reversed its original decision in Bennett's favor and ruled in favor of Verizon. (App., B-4a-32a). Petitioner filed her Notice of Appeal on January 25, 2008. On May 1, 2009, the Second Circuit affirmed the District Court's decision, determining that "[o]n the evidence submitted, a finder of fact could not have reasonably found that the employer's stated reasons were pretext and that the employer was in fact motivated by retaliation." (App. A, 3a).

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is attached hereto at App., A-1a-3a. The September 18, 2007 decision of the District Court is attached hereto at App., C-33 a-52a . The January 24, 2008 decision of the District Court is attached hereto at App., B-4a-32a.

STATEMENT OF JURISDICTION

The judgement of the United States Court of Appeals was issued May 1, 2009. This Court has jurisdiction over this petition under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This action arises under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.§ 2000e, *et seq.*

STATEMENT OF THE CASE

This case is about whether petitioner adequately demonstrated pretext sufficient to withstand summary judgment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), which prohibits employers from discriminating against workers in retaliation for certain conduct. In this regard Section 704(a) provides that:

> [i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Id.

A. The Facts:

On December 31, 2003, Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging retaliation for having engaged in protected activity.

On April 30, 2004, Petitioner received a Notice of Right to Sue from the EEOC.

On July 7, 2004, Petitioner filed her complaint with the District Court for the Western District of New York alleging dual claims of retaliation under Title VII and the New York State Human Rights Law, Section 290 *et seq*, after she was terminated six days after bringing a subordinate's good faith complaint of what she perceived to be a hostile work environment, as well as her own complaints of what she perceived in good faith to be a hostile work environment to her Director, after numerous complaints to her Associate Director were ignored.

1. Petitioner's Work History

Petitioner commenced employment with Respondent in July of 1999.

On or about September of 2002, Petitioner was promoted to supervisor. Petitioner's job responsibilities as a Supervisor were, *inter alia*, to bring to the attention of her supervisor, Associate Director Savino, any violations of Respondent's policies. Respondent's policies specifically charged Petitioner, as a supervisor, with the responsibility to report this matter to Associate Director Savino.

Respondent's policy states in relevant part:

> Employees are encouraged to resolve any workplace issues directly with their supervisor or another supervisor. However,

> any complaint of unlawful discrimination or violation of our harassment policy must be brought to the attention of your supervisor, local Human Resources or the Compliance Guideline (1-800-488-7900).

In turn, complaints brought to Associate Director Savino were to be reported to Director Gulliford.

There was no person, as far as Customer Service was concerned, that was higher in rank than Director Gulliford in the Rochester location.

Director Gulliford had the authority to make recommendations to hire and to terminate employees.

Director Gulliford's obligation as a supervisor under the policies when handling a sexual harassment complaint was to explain the retaliation policy, (of which there is to be no retaliation), and to report to Human Resources any claims of sexual harassment in the work force and gain their guidance in order to investigate and address "any claims" from an employee to make sure the workplace is "hostile-free" and to protect all employees.

Director Gulliford does not know "any claims" that do not fall under that; if someone feels that they are sexually harassed, Director Gulliford would address that claim.

Pursuant to Director Gulliford's sexual harassment training, if an employee feels uncomfortable based on conversations in the work place and they address those

concerns with a supervisor, or if an employee overhears conversations in the workplace and that makes them uncomfortable, then it is the opinion of the person who is bringing these concerns to him and their subjective impression and how the person feels that matters.

When an employee comes to Director Gulliford with a complaint of sexual harassment, if they feel it is inappropriate, then Director Gulliford would report it to Human Resources and then investigate it at the same time.

As a homosexual, Director Gulliford claims he was ***even more sensitive*** to make sure an employee is protected in the workplace by addressing any type of innuendo and rumor that might be in the organization because, according to Gulliford, it can hurt the work environment and it "is destructive to the individual." That is why Director Gulliford is "very keen" on keeping an environment that has an "open door policy" so that an employee who feels the environment is not conducive to open communication and feels there are conversations that are unwelcome can come into his office.

Based on Director Gulliford's "open door policy," and that he knows "how to handle these situations," complaints of hostile environment do not happen frequently.

Notwithstanding, part of Petitioner's duties as Supervisor in charge of a group of 10-15 team members was to be familiar with the Code of Business Conduct. Petitioner had copies of this policy and access to the Business Code of Conduct and completed on-line annual training regarding the Business Code of Conduct.

2. Respondent's Policies & Complaint Procedures

Respondent's policies maintain their intolerance of discrimination and/or harassment on the basis of race, sex, sexual orientation, national origin, religion, age or disability and further provide the means by which employees may bring forward and seek redress of their complaints; these policies are distributed to employees on the first day of work, are posted conspicuously, and are reiterated annually through training sessions.

It is well settled that a supervisor cannot inquire about an employee's sexual preference. Further, while a supervisor is responsible for notifying Human Resources of any relationships within his/her department that may be in violation of the Relationships at Work policy, a supervisor is not permitted to ask an employee (1) if he/she is engaged in a sexual relationship with another co-worker; (2) whether an employee is gay; (3) nor can a supervisor determine without investigation that two employees are intimate with one another.

Finally, the Code of Business Conduct contained a policy entitled "Privacy of Communications" which states in relevant part:

> Our legal and Company requirements governing privacy require that you *do not*:
>
> —Access your personal wireless account information, or those of family or friends, without prior approval by your supervisor.

> Access includes, but is not limited to, issuing credits/adjustments, altering account information, or making payments or equipment changes.

The policy explicitly does not state that a supervisor cannot ask a subordinate to access her account and, for example issue a payment or make an address change.

3. Petitioner's Team of Customer Representatives

Petitioner had a "team" of individuals, that ranged between 10-15 Customer Service Representatives that she was in charge of as a supervisor, including, inter alia, Katrina McKay and Diana Moller.

All Customer Service Representatives are given "user ID's" so that when they enter a transaction or note into the billing system it marks it with their ID, which is the first five initials of an employee's last name and first two initials of their first name.

"**MOLLEDI**" is Customer Service Representative Moller's user I.D., while "**IVRMOT1**" is not a Customer Service Representative user I.D., but rather identifies respondent's "Internal Voice Recognition" system which does not recognize voice but does recognize "press one to add voice mail, press four to make a payment," et cetera.

As part of Petitioner's responsibilities as Supervisor, she had to prepare MORs or monthly operational reviews for each Customer Service Representative that was a member of her team in order to give them feedback on their performance which is placed in their file.

4. Petitioner Engaged in Protected Activity

As a supervisor, it was a standard process that if Petitioner saw something she thought was a violation of the Code of Business Conduct, she would bring that to the attention of her supervisor.

Petitioner referred complaints to Associate Director Savino regarding the conduct of her Team Members Amy Evans ("Evans"), Diane Moller ("Moller"), and David Jackman ("Jackman") who were sending each other inappropriate e-mail monitored by Petitioner.

Team Member Evans clicked on an e-mail from co-worker Jackman, who forwarded it to Moller to demonstrate that Evans and Jackman were discussing Jackman's sexual preferences, and whether Jackman was going to "switch teams" in terms of *his* sexuality.

At no time during this exchange was Moller discussing **her** sexuality. Moller did not discuss her sexuality in the workplace, while other employees were very open about their sexuality.

However, part of the e-mail string that Petitioner had disciplined Moller and Evans for included comments about Jackman's sexuality, because Evans and Moller were directly speaking of Jackman's sexuality in the e-mail.

Prompt remedial action with regard to Evans and Moller for these inappropriate actions was ratified by Associate Director Savino.

Moller received a Written Warning on October 31, 2003 for violating Verizon's Code of Conduct that was presented to her by Petitioner, her supervisor, and copied to Director Gulliford.

Moller objected to the discipline she received, but she was advised by Director Gulliford that what Moller wrote in the e-mail was ***sexual in nature and inappropriate***, and that this was why Moller was being disciplined.

Moller signed the Code of Business Conduct Acknowledgment Form on August 19, 2002, which acknowledged that she received a copy of Verizon's policies and procedures.

Team Member Moller also attended training concerning Verizon's policies and procedures.

In or about August of 2003, Moller took Short Term Disability to deal with depression associated partially with rumors in the workplace that she was a "lesbian" and that she had just recently "come out" to her parents, and that she suffered a breakdown because of this.

Moller "came out" as a lesbian in the workplace only to her Supervisor, Bennet, and to her team member, Evans, and to no one else.

Moller believed these rumors to be started by Team Member Customer Service Representative Katrina McKay sometime in September or October of 2003.

Moller initially heard about it through Team Member Amy Evans, who informed Moller that McKay had asked her on a number of occasions whether Moller was gay, and overheard McKay talk to other people about it.

Accordingly, Moller duly invoked the complaint procedure of the Business Code of Conduct when she complained to Petitioner as her Supervisor that she was having issues regarding team member McKay making comments about Moller's sexuality which involved inquiring as to whether Moller was gay, and what her sexual preference was, constant rumors about Moller's sexuality, and that McKay was telling people that Moller was having a sexual relationship with the Petitioner, and that they had traveled to Canada together for a "torrid" lesbian affair.

Petitioner and her subordinate Moller ***did not have an intimate lesbian relationship***, and the rumor had no basis in fact.

In addition, Moller believed that anytime someone is spreading rumors regarding one's sexuality and implying that the only reason you are doing well with the company is because you're having sex with your supervisor that it was inappropriate.

Accordingly, Moller brought these concerns to Petitioner as her supervisor as per terms of the Business Code of Conduct. Pursuant to these very policies, respondent's supervisors had handled complaints of sexual orientation harassment in the workplace before.

While Director Gulliford, as a homosexual claims to have never handled any complaints of harassment alleged by male homosexuals in the workplace, other supervisors did handle complaints from male homosexual employees regarding their treatment in the workplace. Co-worker Polimeni's complaints regarding his treatment by a co-worker as a homosexual in the workplace were duly handled by Supervisor Norton to Polimeni's satisfaction. Supervisor Norton was not terminated shortly after resolving gay team member Polimeni's complaint of harassment in the workplace in or about January of 2002 and was still employed there as of December 31, 2005.

In addition to Moller's complaints, there were also morale issues in Petitioner's team that she was contending with because certain team members thought Petitioner was exhibiting "favoritism" towards other people on her team as Supervisor.

From September 2003 through November of 2003, there were team members who thought Petitioner was "favoring" Moller over other members of the team, in particular, team member McKay.

Petitioner's team members brought to Associate Director Savino's attention that Petitioner had certain individuals that she gave projects to, i.e. Moller and Platt, more often than to others, and that they were alleging favoritism.

Part of the rumor that was attributed to team member McKay was that Moller and Petitioner had gone to Canada and had a lesbian affair.

Petitioner considered the rumor that she and Moller were involved in a relationship, that Petitioner and Moller had gone to Canada for an affair, and that Moller was being questioned about her sexual preferences to constitute a hostile work environment, in part because comments about sexuality were not common amongst Petitioner's co-workers.

On September 10, 2003, Petitioner reported for the first time what she perceived to be a hostile work environment to her direct supervisor, Associate Director Savino.

Petitioner did not feel that these were simply "work issues" but rather issues that were going on in her team where, as a supervisor, her own sexuality was being questioned and that this was something that needed to stop.

Petitioner took her concerns directly to Savino, rather than to McKay, as per respondent's Code of Conduct which states specifically that "*any complaint of unlawful discrimination or violation of our harassment policy must be brought to the attention of your supervisor.*"

Petitioner reported to Associate Director Savino the rumor that she and Moller were involved in a relationship, that she and Moller had allegedly gone to Canada for an affair, and that Moller was being questioned about her sexual preferences.

Petitioner complained to Savino that it had gone from call avoidance and the issues with morale on the team to questioning other people's sexuality on the team, which Petitioner felt was inappropriate.

Petitioner had the meeting with Savino after a couple of different things had been brought to her attention, including the information regarding the rumor of an affair that had a sexual connotation.

Associate Director Savino did nothing with regard to this first complaint of a hostile work environment.

Petitioner met with Associate Director Savino repeatedly on October 2nd, 22nd, and 24th and that in each of those meetings she informed Savino that the alleged comments regarding her sexual orientation had not ceased, that the environment was becoming increasingly hostile and that such conduct was continuing to trickle down to the performance on Petitioner's team in general; Petitioner felt as though the rumors were the source of these growing problems.

In addition to the statement about Petitioner and Moller, McKay was also making statements to other Customer Service Representatives about favoritism exhibited by Petitioner.

Petitioner never directly discussed McKay's questioning of her sexuality in writing any of her memos to McKay as Supervisor, or to Savino, given the fact that she discussed the matter personally with her, nor did the respondent's policies mandate that Petitioner keep a journal of all her attempts to address her hostile environment complaints with her supervisor.

a. November 9th 2003 Complaint to Associate Director Savino

On November 9th 2003, Petitioner contacted Associate Director Savino again with her continuing concerns regarding McKay.

Associate Director Savino "does not recall" being contacted on November 9th 2003, nor does she recall whether she took any action relative to Bennett's complaint.

b. Moller's November 12th, 2003 Complaint to Director Gulliford

Moller went to Director Gulliford because the "Katrina McKay" issue was escalating, and because she had complained to Petitioner for resolution, but that Petitioner informed her that although she had gone to Associate Director Savino, nothing was being done about her concerns, and that Associate Director Savino never took any further steps and never did anything in regards to Moller's complaints about McKay.

On November 12, 2003, at 2:09 p.m., Moller sent an e-mail to Director Gulliford which stated in relevant part:

> My concerns have already been addressed to my supervisor, [Petitoner], and as far as I know have also been forwarded to my manager, Pat Savino. However, I have not received any sort of resolution or acknowledgment beyond [Petitioner's] assurance that she has passed on my

> concerns. Since I believe my concerns are important and in many ways impact my desire to continue my employment with Verizon Wireless, I think it is necessary to request a meeting with you regarding them.
>
> I am reluctant to include the specifics of my issues in this e-mail-given their sensitive nature-and was hoping that if you had any free time I may be able to speak with you directly regarding them.

Moller also discussed with Gulliford the fact that David Jackman was not disciplined for engaging in inappropriate e-mails with Moller and Evans.

Moller informed Gulliford of the problem she was having with McKay, and that McKay was saying that Moller was "sleeping" with Petitioner, and that McKay was speaking about Moller being gay, and that the rumors included taking a trip out of town to Canada for a torrid love affair, and that this information was coming from other sources, not just McKay herself.

Moller informed Director Gulliford that she had already informed Petitioner of this matter.

Moller was asked directly by Gulliford if she was gay, and if she was sleeping with Bennett; thereafter, Moller was told Gulliford would "look into it."

c. Gulliford's Response to Moller's Complaints

Director Gulliford admitted Moller was "concerned about rumors that she had heard third party from other members of her team in regards to an affair that had happened between her and her supervisor, [Petitioner], on a trip to Canada." Director Gulliford admitted Moller came to his office addressing rumors about Moller and Petitioner and concerns with Moller's sexual orientation being discussed on the floor and concerns with Petitioner not getting any promotions, and that Petitioner was being affected by these rumors.

Despite testifying at his deposition that a supervisor should **not** ask a subordinate whether they are sleeping with someone, Director Gulliford admitted that he asked *what relationship Moller had with Bennett.*

Respondent's policies contained within the Business Code of Conduct clearly states that "[c]laims of unlawful discrimination and unlawful harassment are handled discreetly to the extent possible and are investigated promptly and thoroughly." Respondent's policies also state that "Supervisors and employees are required to contact Human Resources when an issue of discrimination or harassment is made known to them regardless of whether an employee requests confidentiality or states that a formal complaint is not being made."

Pursuant to the above stated polices, Director Gulliford admits that on November 12, 2003 at 11:07 p.m., nine hours after he received this e-mail from Moller, that he immediately contacted Kathy Lippa in

Human Resources via e-mail and reported Moller's complaints to Human Resources, stating:

> Diana Moller is the individual who is challenging a code of conduct recently administered to her for e-mail abuse, and concerns regarding 3rd party information she has from Amy that Diana and [Petitioner] went to Canada for an affair.
>
> We will need to discuss further.

Director Gulliford admits that on November 12, 2003 at 11:07 p.m. he informed Human Resources that Moller complained that that there "was a rumor, correct, that there was an inappropriate relationship."

Director Gulliford admits that on November 12, 2003 at 11:07 p.m. he informed Human Resources that they would have to "discuss further" Moller's complaints that he "informed human resources that there was a rumor..that there was an inappropriate relationship."

Director Gulliford admits that he did indeed "discuss" Moller's complaints about an inappropriate relationship and rumors with Human Resources, (A-778) despite the fact that Associate Director Savino never communicated with Human Resources relative to this matter.

Director Gulliford admitted that not only Moller's complaints but Petitioner as well *were* reported to Human Resources as they were "looking into it" with Moller's complaints.

Human Resources never contacted Associate Director Savino regarding Director Gulliford's complaint to them regarding either Moller or Bennett.

Despite Director Gulliford referring Moller's complaints to Human Resources, Associate Director Savino had no knowledge that he had done so.

However, contrary to its own policies, Director Gulliford admitted that ***no*** investigation was completed.

d. Petitioner's November 13, 2003 e-mail to Associate Director Savino

Pursuant to Gulliford's "open door policy" Petitioner continued to have problems with McKay as late as November 13th, 2003 when she sent an e-mail sent to Associate Director Savino at 8:42 a.m.:

> This issue with [McKay] is effecting my whole team and that is why I have been so [adamant] about meeting with you. I was going to send her home yesterday, because I refuse to have a representative swearing at me in my office. If I should be addressing this with someone else, please let me know. Like I stated above, it is affecting my team and I cannot have that. . . .

Bennett requested a meeting with Director Gulliford because she felt she had done what she needed to do: she went to Associate Director Savino as per the Verizon chain of command and had discussed it with her as late as November 13th, 2003. It then got to the point where, according to Petitioner, it became "too much,"

and that is when she ***requested*** the November 14th , 2003 meeting with Director Gulliford.

Pursuant to Director Gulliford's sexual harassment training, if an employee feels uncomfortable based on conversations in the work place and they address those concerns with a supervisor, or if an employee overhears conversations in the workplace and that makes them uncomfortable, then it is the opinion of the person who is bringing these concerns to him and their subjective impression and how the person feels that matters.

When an employee comes to Director Gulliford with a complaint of sexual harassment, if they feel it is inappropriate, then Director Gulliford would report it to Human Resources and then investigate it at the same time.

As a homosexual, Director Gulliford claimed he was ***even more sensitive*** to make sure an employee is protected in the workplace by addressing any type of innuendo and rumor that might be in the organization because, according to Gulliford, it can hurt the work environment and it "is destructive to the individual." That is why Director Gulliford is "very keen" on keeping an environment that has an "open door policy" so that an employee who feels the environment is not conducive to open communication and feels there are conversations that are unwelcome can come into his office.

Accordingly, Director Gulliford noted in his diary entry for Friday, November 14, 2003, he would conduct a meeting at 9:00-9:30 a.m. with Petitioner at her request. (A-1130).

At or about he same time, Petitioner was also seeking to apply for a promotion to either the manager position or the associate director position.

The primary focus of Bennett and Gulliford's meeting was *not* to discuss the audit findings on Petitioner's cellular phone accounts, but to discuss issues she was experiencing with an employee on her team.

Petitioner informed Gulliford of all of the problems she was having on the team, including the rumor that she and Ms. Moller were engaged in a lesbian affair.

In the course of their conversation, Petitioner claimed she was secure in her own sexuality when discussing the rumors of a lesbian affair between her and Moller; however, because Moller was recently "coming out" as a lesbian, admonished that discussing one's sexual orientation is not something Moller was comfortable with at all.

During the meeting, Petitioner provided Director Gulliford with a detailed time line to further support her complaints, in which she noted that one of the employees on her team, Diana Moller, came to her with a concern that another employee, McKay started a rumor that Moller and Bennett had traveled to Canada to have an affair.

In Petitioner's notes, she states "she (Moller) said that she was upset, because her sexuality is being questioned and then it was passed onto Petitioner.

Petitioner advised Moller that she would discuss it with Pat(Savino), as it was upsetting to Petitioner as well.

Petitioner testified she was "upset" regarding her "sexuality being questioned by a subordinate and "why [Moller] was getting the projects she was getting" and that while "it had no truth to it," Petitioner claimed it was affecting morale as far as the team goes."

Director Gulliford ***admitted*** that Petitioner came to him two days later in or about November 14, 2003 and complained to him that a co-worker was spreading rumors of a sexual nature.

Director Gulliford ***admitted*** that the "rumor" was not only coming from one co-worker, but from "other people."

Director Gulliford ***admitted*** that he "needed to be careful with moving quickly in this case" and that he knew he had to "investigate it."

Director Gulliford ***admitted*** Petitioner's complaints were indeed reported to Human Resources, and that "we were looking into it with [Moller]."

Despite these admissions, Director Gulliford **contradicted** himself in his deposition testimony by stating that Petitioner never complained of an illicit lesbian affair between Moller, her subordinate, and herself, *even though he had already testified that Petitioner's complaints were indeed reported to Human Resources, and that "we were looking into it with [Moller]".*

Petitioner was advised by Director Gulliford that respondent would not investigate her good faith complaints of what she perceived to be a hostile work environment because he deemed them to be "only rumors," despite the admission that Bennett's complaints were *(1)* ***of a sexual nature;*** *and (2)* ***reported to Human Resources along with Moller's complaint only 2 days earlier 9 hours after meeting with Moller and were being "investigated,"*** *and (3)* ***the fact that Director Gulliford himself believed there were rumors of a sexual nature.***

Director Gulliford admits that it was ***his perception*** that Petitioner was treating the allegations of a sexual nature concerning Moller and herself in a joking manner, despite the fact that he admitted Petitioner's complaints were indeed reported to Human Resources, and that "we were looking into it with [Moller]."

5. Petitioner Terminated *Six Days* After Meeting with Director Gulliford

Three days after Petitioner complained to Director Gulliford on November 14, 2003, Gulliford recommended Petitioner's termination on November 17, 2003.

Prior to making the decision to terminate Petitioner, Director Gulliford did not review Petitioner's personnel file.

Prior to November 17, 2003, Director Gulliford never recommended the termination of Petitioner. (A-809).

Just *six days* after the meeting with Director Gulliford, at the end of Petitioner's shift on November 20, 2003, Associate Director Savino came into Petitioner's office and said that she and Director Gulliford wanted to meet with her.

Present at the meeting was Associate Director Savino, Director Gulliford, along with Petitioner.

Savino and Gulliford informed Petitioner Bennet she was being terminated for *month end reviews (MORs) and issues regarding her cell phone account.* Bennett signed some papers, and was asked to turn over her phone and badge.

6. Respondent's Reasons for Terminating Bennett

According to Respondent, it determined that Petitioner's employment should be terminated for violations of the Code of Business Conduct, specifically her instructing her employees to "access and complete transactions on her cellular account."

Petitioner was terminated effective November 20, 2003, despite the fact that during her entire tenure, she maintained a stellar personnel file, and was regularly promoted, and never demoted nor disciplined for work performance issues, nor did she ever violate the Business Code of Conduct. (A-952-54; 1011-43).

Indeed, Respondents's last six month review completed as late as July 23, 2003, *less than four months prior to her termination of November 20, 2003*, indicated in relevant part:

> "[Bennett] is a dependable and a strong team player. She is always willing to assist her peers, her team, and her Associate Director whenever needed. She is a strong advocate of Customer First and believes in First Call Resolution. She consistently adheres to the escalation queue schedule and can be counted on to be available for any challenging customer situation." (A-1044-66).

On November 24th, 2003, four days after her termination, Petitioner sent an e-mail to Verizon Wireless President and Chief Executive Officer, Mr. Dennis Strigl, requesting to speak with him.

In her e-mail she states that some of her concerns include "working in a hostile environment, being harassed by another employee, call avoidance, lack of follow up, sexuality being questioned and being unfairly coached."

Mr. Strigl immediately requested that Mr. Marc Reed, Vice President -Human Resources, "have someone call" Petitioner on his behalf.

7. Respondent's Response to Petitioner's Letter to Strigl

Respondent informed the EEOC that Nancy Percent, Executive Director of Human Resources, *immediately* contacted Petitioner after her termination. Percent indicated that Petitioner felt strongly that McKay was not being disciplined for spreading rumors regarding Petitioner's sexual orientation.

Percent assured Petitioner that Verizon would continue to "investigate" and evaluate her concerns regarding Mckay and take appropriate action where necessary.

However, after Petitioner was terminated on November 20, 2003, ***there was no investigation.***

Stirgl did not even bother to contact Director Gulliford on this matter, contacting instead Marc Reed, who in turn, never contacted Director Gulliford either.

McKay was never disciplined for her actions as alleged by Petitioner.

However, on March 8, 2005, she was placed on "Final Warning" for violating section 3 of the Verizon Code of Business Conduct as a "result of manipulating the Family Share Price plan for the benefit of increasing your KPIs and commissions" and was ultimately terminated for failing to meet her sales quota.

Director Gulliford located a Valentines Day Card in Petitioner's desk after she was terminated. In a December 9th 2003 e-mail from Director Gulliford he states:

> [y]ou can now see where we very careful not to take immediate steps regarding Julie's concern and approach to this representative when we knew there were personal relationships, ***confirmed intimate relationships based on the letters we found in Julie's office after her termination and too much gossip and bickering between the team members.***

Gulliford confirmed an "intimate relationship" between Moller and Petitioner in his December 9th 2003 e-mail, and to Associate Director Savino that Petitioner and Moller were "more than just two friends."

Immediately after Petitioner's termination, Director Gulliford told Associate Director Savino of a card he located in Bennett's desk; although Associate Director never saw the card, she claims Director Gulliford told her that the card was "more than just two friends writing to each other"

While the normal course of Respondent's conduct is when a supervisor's office is cleaned out, it is usually documented what is being sent home to the supervisor; in this case, the card was not sent home to Petitioner, but instead, maintained by Respondent with a copy sent to their counsel and "bate stamped" as such.

Associate Director Savino never saw the card before her deposition of March 30, 2006; when she did read it, she claimed that she could not, as Director Gulliford had done, confirm whether Moller and Petitioner were having an intimate relationship.

9. Petitioner's 15 Reasons Why Respondent's Termination Was Pretextual

Petitioner provided proof in admissible form in support of no less than fifteen reasons why Respondent's termination was pretextual, including:

(1) the temporal proximity of *six days* between the complaint to Director Gulliford and Bennett's termination;

(2) Director Gulliford's admission that he *never recommended the termination of Bennett prior to November 17, 2003*;

(3) Petitioner's stellar personnel file during her entire tenure at Verizon, including: (I) the fact that she had never been disciplined (A-1011-43); (ii) her positive reviews *as late as July 23, 2003* (Vol. II, Ex. M); (iii) *and the fact that she was applying for the next tier of management just days before her termination;*

4) the undisputed fact that Petitioner's *fellow supervisors* who *had not engaged in any prior protected activity* were *demoted and placed on Final Written Warning* for violating the Business Code of Conduct in failing to properly submit their

MOR's, while Bennett, who had never been disciplined during her entire tenure, was terminated without Final Written Warning for her first "alleged" violation of the Business Code of Conduct;

(5) the undisputed fact that Petitioner's *fellow co-workers* who *had not engaged in any prior protected activity* were *placed on Final Written Warning* for violating the Business Code of Conduct, while Petitioner, who had never been disciplined during her entire tenure, was terminated without Final Written Warning for her first "alleged" violation of the Business Code of Conduct;

(6) the undisputed fact that there is *no* documentary proof of any investigation into Petitioner's cellular account prior to November 12, 2003;

(7) the undisputed fact that Respondent claims that they were investigating Petitioner's account on October 31st 2003, when, in contradiction, Respondent informed the EEOC that it was investigating Petitioner's account "at or about the same time" Petitioner met with Director Gulliford on November 7, 2003;

(8) the fact that the language of the Business Code of Conduct policy for which Petitioner allegedly violated does not prohibit her actions, nor can Petitioner be deemed to have encouraged her team members to violate the Code of Business Conduct if what she asked them to do was not in violation of the Code;

(9) the undisputed fact that there were "*no inappropriate credits*" located on Petitioner's account;

(10) Director Gulliford's misrepresentation to Respondent about Moller's activity on Petitioner's account;

(11) the undisputed fact that subordinate employees routinely accessed their supervisor's account with the supervisor's permission as per Respondent's Policy without reprimand;

(12) the undisputed fact that while Respondent did indeed terminate employee Lucy Courvertier for accessing the account of a ***family member 2 days after Petitioner's termination***, Petitioner did *not* access the account of a family member;

(13) Director Gulliford explanation to management that he located a "card" in Petitioner's desk after she was terminated as "proof" that they were lesbian lovers, substantiating the so called "rumor" and his reasons for *not investigating* their complaints to justify Petitioner's termination;

(14) the undisputed fact that Respondent claimed to the EEOC that it "investigated" Petitioner's complaints *after* her termination in direct contradiction to Director Gulliford's testimony that Respondent *never did any further investigation regarding Petitioner's complaints after her termination*;

(15) the undisputed fact that McKay was never disciplined for her actions, nor was any investigation completed with regard to her alleged harassment of Moller and Petitioner.

Based on this evidence, the Second Circuit affirmed the District Court's decision, determining that "a finder of fact could not have reasonably found that the employer's stated reasons were pretext and that the employer was in fact motivated by retaliation." (App., A-3a).

B. The Proceedings Below:

1. The September 18th, 2007 District Court Decision

In its September 18th, 2007 decision, the District Court determined that Petitioner had sufficiently demonstrated her prima facie case (App., C-33 a-52a).

The District Court also determined that Respondent had put forth a legitimate reason for Petitioner's termination: "[h]ere it is undisputed that Bennett instructed her subordinates to access her account in order to alter account information and to make payments on the account using Bennett's credit card without permission from Bennett's supervisor." (App., C-50a)

As to pretext, the District Court first determined, without any consideration given to the totality of the remaining reasons offered as pretext, relied on the sole

fact that a former Verizon employee, Lucy Courvertier, was terminated for making changes to her family members accounts without prior approval from her supervisor was sufficient to raise a material fact precluding summary judgment, stating "[i]f supervisors in a similar position to Bennett regularly gave permission to their subordinates to access the accounts of the supervisor's friends and family, and if these particular supervisors did not have permission to do so from their own supervisor, and if such activity went undisciplined, such a fact could help prove that Verizon's stated reason for termination was pretextual." (App., C, 51a).

2. The January 24th , 2008 District Court Decision

Several months later, the District Court reversed its September 18th, 2007 decision.

This time, the District Court reviewed Petitioner's fifteen reasons, but failed to view them in their totality, stating:

> Although the Court has previously found that Bennett met the *de minimus* requirement of showing she engaged in a protected activity, and that she was terminated in close temporal proximity to that activity. It also found that Verizon articulated a legitimate, non-discriminatory reason for Bennett's discharge. Having granted the motion to

> reconsider, the Court now reverses its prior decision (Docket No. 40) that a material issue of fact precluded summary judgment. Instead, having reviewed again the papers submitted on the original motion, and the papers submitted in connection with Verizon's motion to reconsider and Bennett's opposition thereto, the Court concludes "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits...show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. . Civ. P. 56 (c) (2007) (App., B-31a).

3. The May 1st, 2009 Decision of the Court of Appeals for the Second Circuit

On May 1st, 2009, the Court of Appeals for the Second Circuit affirmed the January 24th, 2008 District Court decision, determining that "[o]n the evidence submitted, a finder of fact could not have reasonably found that the employer's stated reasons were pretext and that the employer was in fact motivated by retaliation." (App., A-3a).

REASONS FOR GRANTING THE PETITION

1. Does the Second Circuit Still Apply the Pretext Plus Standard?

The Supreme Court overruled the pretext-plus requirement in *Reeves*. The Court also reaffirmed that the combination of the prima facie case and a showing that they employer's explanation is not worthy of credence will not always be sufficient to establish intentional discrimination, limited to situations where "no rational fact finder could conclude that the action was discriminatory. *Id.* At 2109. "Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that may properly be considered on a motion for judgment as a matter of law. *Id.* At 2109

It is apparent from the cases that have come down since *Reeves* that the Second Circuit does not believe that *Reeves* made a change to the law in the Second Circuit as it existed after *Fisher* was decided, which the Second Circuit declared in *James* was "wholly compatible and harmonious" with *Reeves*. However, the Second Circuit decisions since *Reeves*, including the case at bar, are simply not inclined to give weight to the inference created by establishing a "minimal" prima facie case. The Supreme Court in *Reeves* stated the strength of the prima facie case and the probative value of the employer's explanation should be weighed in the

process of determining whether the case should go to the jury; the decision at bar states the opposite:

> On the evidence submitted, a finder of fact could not have reasonably found that the employer' stated reasons were pretext and that the employer was in fact motivated by retaliation.

(App. A, 3a).

One is compelled to ask, what happened to the circumstances in the case at bar giving rise to the inference of retaliation represented by the fact that Bennett was terminated a mere 6 days after she engaged in protected activity? Further, what weight should be given to the testimony of Respondent's own witnesses who could not even identify the policy that Petitioner violated?

One need only compare the Supreme Court's decisions to the case at bar to determine that pretext plus is alive and well in the Second Circuit.

2. There is a Circuit Split on Pretext with Inconsistent Results

While the Supreme Court overruled the pretext-plus requirement, it declined to establish a rule that when pretext is established, the case must always go to the jury. The Court determined that "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves* also clarified that

"although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe."

Despite the ruling in *Reeves*, many lower courts resolve inferences against plaintiffs and focus on only certain pieces of evidence rather than "review the record as a whole." There are apparently inconsistent interpretations concerning summary judgment standards in employment discrimination cases[1] that have lead to inconsistent results between the circuits.[2]

3. There is a Circuit Split as to the Appropriate Weight Given Temporal Proximity

In 2001, in *Clark County School District v Breeden*, 532 U.S. 268 (2001) the Supreme Court held that very close temporal proximity alone could be sufficient evidence for a prima facie connection. The Supreme Court left unresolved, however, a number of issues regarding the weight to be given temporal proximity in retaliation claims beyond the prima facie stage. Lower federal courts are split on this issue. For example, in *Buettner v Arch Coal Sales Co.*, the Eight Circuit held that temporal proximity alone is insufficient to allow a case to proceed to trial. 216 F.3d 707. In contrast, the Second Circuit has given substantial weight to temporal proximity evidence. In *Cifra*, the Plaintiff was discharged a mere 20 days after defendant had learned

1. Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 C.L. REV. 203, 221-42(1993).

2. See Footnote No. 1, *supra*.

of her gender discrimination claims. The Second Circuit reversed the lower court's grant of summary judgment to the employer, reasoning that the 20 day time period was itself "sufficient evidence in the record from which a rational fact finder could conclude that [defendant's] explanation was a pretext for retaliation," and thus summary judgment was not appropriate. Other circuits have deemed temporal proximity alone insufficient for a plaintiff to survive summary judgment, requiring a plaintiff to adduce additional evidence of pretext to rebut a defendant's proffered non-retaliatory reasons for the adverse action it took.

4. This Case is an Excellent Vehicle to Provide Guidance in the Particular Area of Law

When the Court decided *Reeves* in 2000, lawyers regularly representing plaintiffs in employment discrimination cases employing the burden shifting analysis discussed in *Reeves* declared a major victory because it seemed as though the pretext-plus rule for proving intentional discrimination had been rejected. As asserted herein, that is not the case. There are many attorneys who simply do not know, on a case to case basis, what is expected of them to defeat summary judgment. What is more frustrating is that it is often the case that a judge's own bias will dictate the outcome. This matter would provide an excellent vehicle to provide general guidance in the particular area of law.

CONCLUSION

For the foregoing reasons, Petitioner submits that this Court should grant review in this case to reverse the holding of the Second Circuit in this case. Petitioner would also ask this Court to remand the case to the District Court for trial.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED MAY 1, 2009

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 1st day of May, two thousand nine.

PRESENT: HON. DENNIS JACOBS,
Chief Judge,
HON. JOHN M. WALKER, JR.,
HON. PIERRE N. LEVAL,
Circuit Judges.

08-0482-cv

JULIE M. BENNETT,

PLAINTIFF-APPELLANT,

-v.-

VERIZON WIRELESS,

DEFENDANT-APPELLEE.

Appendix A

Appeal from a judgment of the United States District Court for the Western District of New York.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED.**

Julie Bennett appeals from a judgment of the United States District Court for the Western District of New York (Siragusa, J.) entering summary judgment in favor of Verizon Wireless on Bennett's retaliation claims under the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the New York State Human Rights Law section 296 *et seq.* ("NYSHRL"). Bennett alleges that she was fired after complaining about a rumor that suggested she was having an affair with a female subordinate. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

Both Title VII and the NYSHRL prohibit an employer from retaliating against an employee because that employee opposed an unlawful practice. 42 U.S.C. § 2000e-3(a); N.Y. Exec. Law section 296(1)(e). Claims brought under both statutes can be analyzed in tandem. *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 765 (2d Cir.1998).

The district court properly granted summary judgment. The employer furnished lawful reasons for terminating Bennett. At that point the presumption established by *McDonnell-Douglas Corp. v. Green*, 411

U.S. 792 (1973), dropped away, and the plaintiff bore the burden of showing that the employer's action against her was taken in retaliation for her complaints. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 173 (2d Cir.2005). The plaintiff failed to sustain that burden. On the evidence submitted, a finder of fact could not have reasonably found that the employer's stated reasons were pretext and that the employer was in fact motivated by retaliation.

Accordingly, we hereby **AFFIRM** the judgment of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

By: s/ Franklin Perry

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK DATED JANUARY 23, 2008

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

04-CV-6314 CJS

JULIE M. BENNETT,

Plaintiff,

-vs-

VERIZON WIRELESS,

Defendant.

DECISION AND ORDER

Siragusa, J. Before the Court is defendant Verizon Wireless' ("Verizon") motion for reconsideration (*Docket No. 41*) of the Court's Decision and Order (*Docket No. 40*) denying summary judgment for Verizon. For the reasons stated below, the Court grants Verizon's motion for reconsideration, and upon reconsideration, grants Verizon's motion for summary judgment. The Clerk is directed to enter judgment for Verizon.

Appendix B

BACKGROUND

The Court's prior decision fully discussed the facts, and familiarity with them will be presumed. Verizon argues in its reconsideration motion that the Court erroneously relied on the affidavit of Lucy Couvertier to conclude that plaintiff Julie M. Bennett ("Bennett") had raised a material question with regard to whether Verizon's purported reason for dismissing Bennett was a pretext. Specifically, Verizon focuses on the Court's determination that the Couvertier affidavit showed it was a "common practice" for supervisors at Verizon to permit their employees to access the supervisor's family's and friends' accounts and make changes to them. (Couvertier Aff. ¶ 8, *Docket No. 33, at 10.*) Verizon argues that Bennett made no showing that any supervisor, other than the unnamed one mentioned by Couvertier, gave a subordinate this permission, or that Couvertier's supervisor was similarly situated to Bennett, or that Couvertier's supervisor did not have permission from *her* supervisor to access her family's and friend's accounts, or that Couvertier's supervisor's conduct was known to the decision-makers who fired Bennett. (Def.'s Mem. of Law in Support of Mot. to Reconsider, *Docket No. 43, at 5.*) Bennett responds with 15 reasons why a material issue of fact precludes summary judgment, one of which is based on Couvertier's allegations. In response, Verizon points to its reply to the summary judgment response in which they discussed why each of the 15 reasons was insufficient to preclude summary judgment.

Appendix B

STANDARD OF REVIEW

An interlocutory judgment, such as the Court's September 19, 2007, Decision and Order denying summary judgment, "is subject to revision at any time before the entry of [final] judgment." Fed.R.Civ.P. 54(b) A party seeking reconsideration must set "forth concisely the matters or controlling decisions which counsel believes the court has overlooked." *Id.* Thus, upon a motion to reconsider a "district court has the discretion to reconsider, and if appropriate, revise an interlocutory order." *Kliszak v. Pyramid Mgmt. Group.*, No. 96-CV-0041E(Sc), 1998 U.S. Dist. LEXIS 7588, 1998 WL 268839, *1 (W.D.N.Y. Apr. 30, 1998) (citing *Partmar Corp. v. Paramount Corp.*, 347 U.S. 89, 100, 74 S.Ct. 414, 98 L.Ed. 532 (1954)); *see also Virgin Atlantic Airways v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir.1992) (district court has broad discretion to revise an interlocutory order, noting "need to correct a clear error" as a major ground justifying reconsideration). While a district court has broad discretion to grant reconsideration, parties should not be allowed simply to reargue their case, or present new facts and issues that they failed to argue in the first instance. *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir.1995); *Lehmuller v. Incorporated Village of Sag Harbor*, 982 F.Supp. 132, 135 (E.D.N.Y.1997).

Appendix B

ANALYSIS

First, the Court adheres to its original determination that Bennett put forth a *prima facie* case, and that Verizon articulated a legitimate, non-discriminatory reason for Bennett's discharge. At oral argument on the motion to reconsider, the Court focused on one issue raised by Verizon: the Court's reliance on Couvertier's affidavit. In that regard, Verizon argues that Bennett attempted to show through Couvertier's affidavit that two supervisors (Couvertier's and Bennett, who was a supervisor herself) were similarly situated, and that despite the similarities, Couvertier's supervisor was not dismissed, but Bennett was. Verizon relies on the Second Circuit's decision in *Graham v. Long Island R.R.*, 230 F.3d 34, 39-44 (2d Cir.2000). In that case, the court wrote that,

> When considering whether a plaintiff has raised an inference of discrimination by showing that she was subjected to disparate treatment, we have said that the plaintiff must show she was "similarly situated in all material respects" to the individuals with whom she seeks to compare herself.

Graham, 230 F.3d at 39 (quoting *Shumway v. United Parcel Serv.*, 118 F.3d 60, 64 (2d Cir.1997). The Court went on to articulate what was meant by the phrase, "all material respects," holding that, "the standard for comparing conduct requires a reasonably close resemblance of the facts and circumstances and

circumstances of plaintiff's and comparator's cases, rather than a showing that both cases are identical." *Id.*, at 40 (citation omitted). The specific factual situation in *Graham* is instructive on this point. There, the appellate court wrote:

> Beyond his bare assertion, Graham offers no proof that LIRR gave last chance waivers automatically for first time drug and alcohol offenders as a matter of policy or custom. Instead, the only evidence he offers is that one white employee, Carl DiPersia, tested positive for cocaine use in 1987 and received a last chance waiver after his first violation without having to file a grievance. Such isolated evidence is insufficient to make a showing that LIRR maintained a policy or custom.
>
> In addition, the chief trial and investigative officer in Graham's department, Ralph J. Domenici, denied that such a policy was in effect during his tenure in the department between 1985 and 1991.

Id., at 41. This factual scenario parallels Bennett's in that her supervisor, Gulliford (the one who actually terminated her) also denied it was a common practice for supervisors to unilaterally authorize their subordinates to make changes to the supervisor's family's and friends' accounts. (Gulliford Decl. ¶ 40,

Docket No. 18, at 11.)[1] Bennett's memorandum of law in opposition lists 15 reasons, only one of which touches on this point. At number 11 she states, "[t]he undisputed fact [is] that subordinate employees routinely accessed their supervisor's account with the supervisor's permission as per Verizon Policy without reprimand." (Pl's Mem. of Law, *Docket No. 45, at 4.*)

In order to determine whether Couvertier's affidavit supports Bennett's contention, the Court must carefully parse the specific language to determine whether it is evidentiary proof in admissible form of disparate treatment. Specifically, Couvertier stated, in pertinent part:

> Indeed, I had routinely made changes to not only my family['s] and friends' accounts with the prior approval of my supervisor, but to the accounts of my supervisor's family and friends' accounts, all with prior approval by that same supervisor, and that this was common practice. I was only terminated when I accessed my family member's account without prior approval.

---

1. While I was Director of the Verizon Wireless Call Center in Rochester, New York, I did not become aware of any other circumstance where a supervisor allowed or instructed one of her subordinates to access and/or make changes to that supervisor's account. If I had been aware of any such activity, it would be investigated as a violation of the Code of Business Conduct, and appropriate disciplinary action would be taken if such activity were substantiated."

Appendix B

(Couvertier Aff. ¶¶ 8-9, *Docket No. 33, Ex. B.*) Couvertier's statement does not specify the "this" which she claims was common practice, but it appears to be that she believed it common practice to access her supervisor's family's and friends' accounts with her supervisor's permission. What is unsaid, is whether Couvertier's supervisor, like Bennett, did not have permission from a supervisor in her own chain of command to grant Couvertier permission to access the accounts. In that regard, Couvertier acknowledged that Verizon's Business Code of Conduct contained this provision:

> Our legal and Company requirements governing privacy require that you ***do not***: . . .
>
> Access your personal wireless account information or those of family or friends, without prior approval by your supervisor. Access includes, issuing credits/adjustments, altering account information or making payments or equipment changes.

(*Id.* (emphasis in original).) On reconsideration, the Court concludes, therefore, that Couvertier's affidavit does not support Bennett's argument that a similarly-situated employee was treated more favorably. Consequently, again upon reconsideration, the Court determines that based upon the Couvertier affidavit alone, a material issue of fact that would preclude summary judgment does not exist, and the Court must, therefore, discuss the matters raised in the original summary judgment motion that were not addressed in the initial decision.

Appendix B

In her response to the reconsideration motion, Bennett presents fifteen reasons for why this Court should find a material issue of fact precluding summary judgment. The Court will addresses each one in turn.

Temporal proximity between Bennett's complaints and her termination

On November 17, 2003, six days after Bennett complained to her supervisor, Gulliford, on November 14, 2003, Gulliford recommended her termination. Six days after the November 14 meeting, Savino and Gulliford informed Bennett she was terminated for month end reviews ("MORs") and issues regarding her cell phone account. Bennett argues that this sequence of events represents a strong temporal proximity between her protected act, and the alleged retaliation. Her argument finds some support in *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 180 (2d Cir.2005), which relied on *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 770 (2d Cir.1998). However, *Jute* overlooked the factors considered by the court in *Quinn.* In *Quinn*, the Second Circuit relied not only on the strong temporal proximity between the employee's protected conduct and the adverse employment action, but also the following: "[n]early all of the record evidence supporting the Company's asserted non-retaliatory reason for discharge both was generated by two of Quinn's alleged harassers-Fahey and Harwood-and followed her initial inquiry with the DHR regarding sexual harassment." In contrast to that situation, here the evidence supporting Verizon's non-retaliatory reason for

discharging Bennett was generated before Bennett complained to Gulliford and is not disputed by Bennett. Indeed, later in her memorandum of law, Bennett argues that directing a subordinate to access her account was *not* a violation of Verizon's Business Code of Conduct. (Pl.'s Mem. of Law, *Docket No. 36*) at 16.) Moreover, neither the *Jute* panel nor the panel in *Quinn* addressed the specific question presented here: is temporal proximity alone enough to show that the defendant's non-retaliatory reason was pretextual? Another Second Circuit panel[2] addressed this very issue in a summary order, citing to *Quinn*:

> While the temporal proximity of these events gives rise to an inference of retaliation for the purposes of appellant's prima facie case, without more, such temporal proximity is insufficient to satisfy appellant's burden to bring forward some evidence of pretext. *See Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 770 (2d Cir.1998) (holding that a strong temporal connection between the plaintiff's complaint and other circumstantial evidence is sufficient to raise an issue with respect to pretext).

Simpson v. New York State Dept. of Civil Services, 166 Fed. Appx. 499, 502 (2d Cir. Jan 9, 2006). Since the decision in *Simpson* is not precedential, *see* U.S. Court of Appeals, Second Circuit, Rules § 0.23(b), the Court

2. The Honorable Thomas J. Meskill was on the panel that decided *Quinn* as well as the panel for the decision in *Simpson*.

also relies on the reasoning in decisions of two other circuits, which the Court finds persuasive on this point. *See Skrjanc v. Great Lakes Power Service Company*, 272 F.3d 309 (6th Cir.2001) ("temporal proximity is insufficient in and of itself to establish that the employer's nondiscriminatory reason for discharging an employee was in fact pretextual."); *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1397-98 (10th Cir.1997) (disagreeing with the plaintiff's argument that temporal proximity between protected activity and adverse employment action is always sufficient to survive summary judgment).

Viewing the evidence in the light most favorable to Bennett, the Court determines that there is an insufficient basis for a trier of fact to doubt the persuasiveness of the Verizon's proffered evidence and ultimately to find that the reasons offered by them for Bennett's dismissal were pretextual.

Gulliford never recommended termination prior to November 17, 2003 and Bennett maintained a stellar personnel record

The next two arguments (Nos. 2 & 3) Bennett makes are that Gulliford did not recommend terminating her until three days after she complained to him about two of her team members, and that, while employed at Verizon, she maintained a stellar performance record with no disciplinary issues and with regular promotions. Bennett seems to contend, therefore, that the reason for termination proffered by Gulliford must be pretextual. (Pl.'s Mem. of Law (*Docket No. 36*) at 13.)

In this regard, Gulliford testified at his deposition in response to Bennett's counsel's questions as follows:

> Q. Since July of 1999 through November 2003, the question is did you ever have any opportunity in that time period to recommend her termination?
>
> A. I did recommend termination in November of 2003.
>
> Q. Let me make it more clear. Prior to November 2003, going back to her start date of July of 1999, did you ever have any prior occasion to recommend her termination?
>
> A. No.

(Gulliford Dep., *Docket No. 20, Ex. C, at 65.*) Clearly, Gulliford stated that he had no reason to recommend Bennett's termination prior to learning of her violation of the Business Code of Conduct. During her deposition, Bennett testified about this issue in response to questioning by Verizon's counsel:

> Now, by having your subordinate employees make changes to your personal consumer account, weren't you condoning a violation of the Code of Business Conduct?
>
> A. Which I had stated before when I had spoken with Mr. Gulliford the changes that I

> felt were made were not significant enough nor were they against what their normal job duties were, due to the fact that I could have made that exact same call in and had those changes made by that representative who made those changes or a number of other ones that work in the Rochester area.

(Bennett Dep., *Docket No. 20, Ex. B, at 69.*) Thus, Bennett's argument appears to be that Gulliford's decision to fire her for a violation of the Business Code of Conduct was unwise in light of Bennett's stellar prior record and the *de minimis* nature of her violation of the Code of Business Conduct. However, unless the termination is based on a reason the law forbids, its wisdom is not for the Court to judge. *See Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir.1982) (federal discrimination statutes "do[ ] not authorize the courts to judge the wisdom of a corporation's business decisions"); *see also Logan v. Caterpillar, Inc.*, 246 F.3d 912, 921 (7th Cir.2001) ("When an employer articulates a reason for discharging the plaintiff not forbidden by law it is not our province to decide whether the reason is wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination."); *Sharp*, 232 F.Supp.2d at 1380 ("Nor does [Title VII] require the employer to have good cause for its decisions. The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason."); *Ellis v. Provident Life & Accident Ins. Co.*, 926 F.Supp. 417, 419 (S.D.N.Y.1994).

The Court, consequently, disagrees thatthese arguments create an issue of fact as to whether Guilford's proffered reason for Bennett's termination was pretextual and that discrimination or retaliation was the real reason.

Similarly-situated employees

Bennett raises in her next arguments (Nos. 4 & 5), that several other Verizon supervisors, who had not engaged in protected activity, were only given a written warning for violating the Business Code of Conduct, whereas Bennett was terminated. (Pl.'s Mem. of Law, at 7.) Verizon contests that any of the comparators Bennett discusses were similarly situated in all material respects. *Graham*, 230 F.3d at 39.

Bennett first raises the situation of Tammy Norton, a supervisor. She was demoted on November 2, 2003, to the position of lead coordinator after an October 31, 2003, audit of her work performance revealed that she failed to complete MORs[3] for the prior three months. Bennett then raises the situation of another supervisor, Vicki Field, who was also demoted to a lead coordinator position on November 12, 2003. Field's work was also subject to an October 31, 2003, audit which determined that her MORs were incomplete, inaccurate and never delivered to her team members. In contrast, Bennett states that her MORs were accurate, complete and timely prepared, yet she was terminated, while the other two supervisors were merely demoted. (Pl.'s Mem. of Law, at 8-9.)

3. Neither party explains what this abbreviation means.

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As discussed above, with respect to Couvertier's supervisor, the comparators must be similarly situated in all respects with Bennett in order to be of legal value to her argument that she was treated differently and, hence, illegally. Both of these two supervisors Bennett discusses were found to have had performance issues. Verizon's Code of Business Conduct does not address poor performance as a basis for termination, whereas it does specifically address the conduct Bennett was found to have undertaken.[4] The Code of Business Conduct states, in its conclusion, that

> Violations of the law, Our Code, and other Company policies, procedures, instructions, practices and the like can lead to disciplinary action up to and including termination from employment. Such disciplinary action may also be taken against supervisors or executives who condone, permit or have knowledge of illegal, unethical or other improper conduct and do not take appropriate action.

(Our Code of Business Conduct, *Docket No. 20, Ex. E, at 24.*) The two supervisors to whom Bennett compares herself are not similarly situated in all material respects. *Graham*, 230 F.3d at 39. That they were given warnings, and not terminated, does not show that Bennett was the victim of disparate treatment.

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4. The Court is aware that Bennett contends the Code did not prohibit what she did, through a subordinate, and will address that argument below.

Bennett also raises the situation of two other employees at Verizon and asks the Court to compare their situations with her own. One is Diana Moller who received a written warning on October 31, 2003, and the other, Katrina McKay, was placed on a final warning on March 8, 2005. Bennett and her supervisor, Savino, addressed the written warning to Moller as a result of Moller's having sent inappropriate emails to a teammate on two occasions which they described as "pointing to a continuing pattern of abuse of the company e-mail system." (Written Warning Code of Conduct, *Docket No. 32, Part 3, at 38.*) Neither Moller nor McKay was a supervisor and, in fact, both reported to Bennett. Furthermore, McKay's situation took place years after Bennett's termination. The Court is not persuaded that either employee was similarly situated in all material respects to Bennett. As a supervisor, Bennett instructed her employees to do what the Verizon policy prohibited them, and her, from doing directly-accessing her own accounts, or those of her family or friends. The consequence for doing so was no more severe than that suffered by fellow employee Lucy Munoz, also not a supervisor, who accessed her family member's account and was terminated as a result. (Gulliford Decl., *Docket No. 18 ¶ 41*).

Investigation of Bennett's cellular telephone account

Bennett's sixth argument against summary judgment is that until November 12, 2003, at 2:09 p.m., there had been no investigation of her cellular account; thus, she concludes, any investigation was undertaken

in retaliation for her engaging in a protected activity. (Pl.'s Mem. of Law, *Docket No. 45, at 10.*) In contrast to Bennett's assertion, Gulliford stated in his declaration that it was on or about October 31, 2003, that the associate director of customer service, Darryl Hunt, advised Gulliford of "questionable activities on Ms. Bennett's cellular account." (Gulliford Decl., *Docket No. 18 ¶ 28*). Evidently, the close scrutiny came as a result of Bennett's fiancé's call to Verizon about Bennett's account and charges for text messaging. The fiancé was David Munoz, a former Verizon employee himself, and brother of Lucy Munoz, then a Verizon employee. David Munoz was the family member whose account Lucy Munoz accessed, conduct which resulted in her termination from Verizon. David Munoz was an authorized user on Bennett's account and his angry call to Verizon about the text messaging charges resulted in his call being referred to Hunt. While investigating the text messaging issue on the account, Hunt discovered questionable activities and informed Gulliford about them. (Gulliford Dep., *Docket No. 20-05, at 71.*) David Munoz's initial October 31, 2003, call to Verizon is documented in Verizon's Exhibit L, *Docket No. 20-14.* Also contained in Exhibit L are email messages between Hunt and Gulliford, the earliest of which is a message from Hunt dated November 12, 2003, at 6:33 p.m., addressed to Gulliford, beginning, "Buddy, Just a brief summary FYI. There were no inappropriate credits on Julie's account." (*Id., at 13.*) The evidentiary proof before the Court does not show that Verizon's investigation began subsequent to Bennett's protected activity. Therefore, the Court determines that Plaintiff has failed to raise a material issue of fact on this point.

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Verizon's representations to the EEOC regarding its investigation of Bennett's cellular telephone account

Bennett argues in her seventh point that Verizon's claim that it started investigating Bennett's account prior to her protected activity is a recent fabrication. (Pl's Mem. of Law (*Docket No. 36*) at 14.) She claims that she first met with Gulliford on November 7, 2003, and that the events Hunt investigated had "mostly occurred months prior to November 2003." (*Id.*) She concludes that "Verizon has failed to proffer a reasonable explanation as to why Bennett was not disciplined earlier for these actions." (*Id.*) Further, Bennett claims that Verizon misrepresented the facts to the EEOC.

First, Verizon's letter to the EEOC stated, *inter alia:*

> Mr. Gulliford met with Ms. Bennett on two different occasions during the first week of November to better understand how she had been handling the delivery of the MOR's [sic]. During their first meeting, Ms. Bennett denied trying to obtain signatures from her representatives in this fashion, but during their second meeting, she changed her story and acknowledged that she had in fact obtained several signatures from her employees on October 31st, after Mr. Gulliford's e-mail was distributed. [footnote omitted]

> At or around this same time, Mr. Darryl Hunt, Associate Director-Customer Service, advised Mr. Gulliford of questionable activities on Ms. Bennett's consumer cellular account. The events leading up to the discovery were as follows. On or about October 31, 2003, Mr. David Munoz, the authorized user on Ms. Bennett's consumer cellular account and a former Verizon Wireless employee, called in to the Customer Service Call Center to complain about additional text messaging fees which he incurred. Mr. Munoz was extremely upset during the call. As a result, Mr. Munoz's call was escalated.

(Verizon EEOC submission (Mar. 8, 2003), at 3, Ex. G to Pl.'s Local Rule 56.1 submission, *Docket No. 32-01, at 38.*) Bennett's time line indicates that it was not until November 9 that she discussed the issue forming the basis for her complaint to EEOC with her supervisor, Pat Savino:

> Diana Moller also came to me with a concern that she was advised that Katrina was questioning Diana's sexuality and that she knew that she was the one that started the rumor about us going to Canada and having a sexual affair. She said that she was upset, because her sexuality is being questioned and then it was passed onto me. I told her that I would discuss it with Pat, as it was upsetting to me. Diana said that she does not feel as though it was anyone's business.

> *11/9*-1 called Pat on my ride home to advise of what had happened that day.

(Timeline, *Docket No. 20, Ex. J, at 4.*) Thus, the evidentiary proof on the pending motion shows that Verizon's investigation of Bennett's cellular telephone account occurred prior to the date on which she informed management of the facts forming the basis of her EEOC complaint. The proof does not raise a material issue of fact, and in support of her contention that the investigation of her account, which formed the basis for her ultimate termination, resulted from her complaint about sexual harassment or a hostile work environment.

Verizon's Business Code of Conduct

In her eighth argument against summary judgment, Bennett contends that Verizon's Business Code of Conduct does not prohibit her from authorizing subordinates to make changes to her own cellular telephone account, or those of her friends. (Pl.'s Mem. of Law (*Docket No. 36*) at 21.) Bennett's argument is, essentially, that although the Code prohibits an individual employee from accessing his own account, it does not prohibit access directed by a supervisor. The Court is convinced by the evidentiary proof submitted on the motion that the Code prohibits *any* employee from accessing his or her account, or directing another employee to do so, unless authorized by the account-holder's supervisor. During her deposition, Bennett testified about this issue in response to questioning by Verizon's counsel:

> Now, by having your subordinate employees make changes to your personal consumer account, weren't you condoning a violation of the Code of Business Conduct?
>
> A. Which I had stated before when I had spoken with Mr. Gulliford *the changes that I felt were made were not significant enough* nor were they against what their normal job duties were, due to the fact that I could have made that exact same call in and had those changes made by that representative who made those changes or a number of other ones that work in the Rochester area.

(Bennett Dep., *Docket No. 20, Ex. B, at 69* (emphasis added).) Even Bennett does not dispute that she violated the Code of Business Conduct when she directed subordinates to do what she herself was not authorized to do, but argued simply that the violation was insignificant. The argument that it was not a violation if she had a subordinate do what she could not, is not persuasive. Bennett merely acted through agents to access her own account. Thus, the subordinates who accessed her account at her direction were not violating the Business Code of Conduct, but in directing her subordinates to do so, Bennett was, herself, violating that provision. Had Bennett's supervisor authorized her to access her own account, she could have directed a subordinate to do so without violating the Code.

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No inappropriate credits on Bennett's account

Bennett's ninth argument against summary judgment consists of the following: "There were no inappropriate credits located on Bennett's account. (Vol.II, Ex. GG)." (Pl.'s Mem. of Law (*Docket No. 36*) at 21-22.) Bennett's argument overlooks that in his report to Gulliford, Hunt not only stated there were no inappropriate credits, but stated further, "(With the exception of the recently applied SMS credits, which have been removed)." (Vol. II, Ex. GG, *Docket No. 32-4.*) Nevertheless, Verizon's Business Code of Conduct (*quoted above* at 5) did not prohibit inappropriate credits, it prohibited all "access" to one's personal account, or those of family of friends. Thus, as the brevity of Bennett's argument suggests, the fact that there remained no inappropriate credits on Bennett's account is of no consequence to Verizon's motion.

Largest credit card payment on Bennett's account

Bennett's tenth argument against summary judgment is that the highest credit card payment on her account was not entered by a subordinate, but by Bennett herself, using the self-help system available to any customer of Verizon. (Pl.'s Mem. of Law (*Docket No. 36*) at 22.) By this argument, Bennett does not dispute that her subordinates accessed her account contrary to Verizon's Business Code of Conduct. As with Bennett's ninth argument, this fact is inconsequential to the pending motion.

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Bennett acted through agents

Bennett's eleventh argument is a variation of her eighth argument, discussed above (at 13). Essentially, she contends that she did not violate Verizon's Business Code of Conduct because she herself did not access her account—her subordinates did and with her permission. This illogical argument has been addressed by the Court and rejected. Bennett is not claiming that her subordinates acted without her authority. Thus, the acts of her subordinates are imputed to her. *C.f. In re Mediators, Inc.*, 105 F.3d 822, 827 (2d Cir.1997) ("Under New York law, the adverse interest exception rebuts the usual presumption that the acts and knowledge of an agent acting within the scope of employment are imputed to the principal."). Bennett's argument requires a strained, illogical reading of the Business Code of Conduct, which Verizon has conclusively shown prohibits access to one's account, either by onself, or by directing one's subordinate to act on one's behalf.

The greeting card

Bennett's thirteenth argument against summary judgment is that, following her termination, Gulliford discovered a Valentine's Day card in Bennett's desk with a letter signed "D" and concluded that Bennett and Moller had an intimate relationship. (Pl's Mem. of Law (*Docket No. 36*) at 23-24; Letter and card, Ex. FF, *Docket No. 32-4.*) She also refers to a December 9, 2003, email by Gulliford, in which he wrote the following:

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Julie expressed her concern with Katrina McKay and did not agree with a decision her Associate Director made regarding an approach to correct and warn about call avoidance. Julie felt this employee was "getting away with murder" and "should be disciplined more". Our concern with doing anything other than coaching the entire team on expectations was the fact that two confirmed friends of Julie that reported to her, Diana and Amy, used to be friends with Katrina.

Also, within two days Diana requested a meeting with me to discuss rumors that she heard Katrina was spreading about an intimate relationship between her and Julie, and Julie met with me to discuss her concern with not doing more with "this troublemaker"- referring to Katrina. Diana informed me that Amy provided her with the information regarding the rumor, and Julie informed me that she was in fact friends with both Diana and Amy-who were no longer friends with Katrina. You can see now where we were very careful not to take immediate steps regarding Julie's concern and approach to this representative when we knew there were personal relationships, *confirmed intimate relationships* based on the letters we found in Julie's office after her termination, and too much gossip and bickering between team members.

> We will continue to keep an eye on Katrina to ensure she is abiding by guidelines and not avoiding calls.

(Gulliford email to Nancy Percent (Dec. 9, 2003, 10:09 p.m.), Ex. JJ, *Docket No. 32-4* (emphasis added).) Bennett then relates that at his deposition, Gulliford was asked the following questions and gave the following answers:

> Q. And was it your impression that they did [ ][5] have an intimate relationship with one another?
>
> A. Intimate, I don't know. Was it my impression?
>
> Q. Right.
>
> A. They had a friendship. I don't know what the relationship was.

(Guilliford Dep., *Docket No. 30-1*, at 24.) Apparently, Bennett is arguing that Gulliford's misstatement in the email, "we knew there were personal relationships, confirmed intimate relationships based on the letters

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5. In her memorandum of law (*Docket No. 36*) at 14, Bennett's counsel cites to "Vol. I, Ex C, p. 24, Lies [sic] 15-20" as the source for her quotation. However, in the memorandum of law, Bennett's counsel added the word "not" at this location, whereas in the transcript, Exhibit C, the word "not" does not appear.

we found in Julie's office after her termination," if it was a misstatement, or in his deposition testimony, if the email was correct, shows that Verizon's reason for terminating her was a pretext and that discrimination was the true reason. Bennett's stated claim against Verizon was retaliation, not a hostile work environment. (Pl.s Mem. of Law (*Docket No. 36) at 2*.) Thus, Verizon's failure to investigate her complaint about rumors circulating in the work place do not establish that Verizon's stated reason for Bennett's termination was a pretext. Further, Gulliford learned in his meeting with Moller on November 12, 2003, about rumors being spread by Katrina McKay that an intimate relationship existed between Bennett and Moller. (Gulliford Decl. (*Docket No. 18*) ¶ 35.) Gulliford informed the human resources department the same evening about the issue. (*Id.* ¶ 36.) When he met with Bennett, Gulliford raised the issue with her and, according to Gulliford,

> Ms. Bennett did not appear to take the issue very seriously and, in fact, seemed to find the topic somewhat amusing. Ms. Bennett informed me that the rumors regarding a relationship between the two had been circulating since July, that Mr. Munoz, Ms. Bennett's fiancé, was also aware of the rumors, and that they had both just laughed about it.

(Gulliford Dep. (*Docket No. 20, Ex. C*) ¶ 37.) Bennett claims that the Valentine's Day card and letter were given to Verizon's counsel, citing to Pat Savino's

deposition testimony, at pages 56 and 71. Her testimony at those cited pages indicates that the usual policy upon cleaning out a supervisor's office was to send to that supervisor personal property found, but Savino did not know whether the card and letter were sent back to Bennett, or what became of them. In any event, if they were retained by Verizon, it most likely would have been in contemplation of a hostile work environment claim. Since Bennett specifically states in her memorandum of law that she is not bringing such a claim, this information is irrelevant to the issue before the Court, since it has already determined that Bennett was engaged in protected activity in its prior decision.

No further investigation by Verizon

Bennett's fourteenth reason for denying summary judgment is that following Bennett's termination, Verizon never completed an investigation of her complaint about a hostile work environment. (Pl.'s Mem. of Law (*Docket No. 36*) at 25.) Bennett contends that Verizon's policy required Gulliford to report the issue to the human resources department and that Verizon misrepresented itself on this point to the EEOC. Once again, however, Bennett's complaint is retaliatory discharge, not hostile work environment. (*See*, Pl.s Mem. of Law (*Docket No. 36) at 2.*)

Since Verizon proffered a non-discriminatory reason for her discharge, Bennett is afforded an opportunity to demonstrate that Verizon's proffered reason was pretextual, "either directly by persuading the court that

a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). She must show that Verizon's proffered reason is not credible, and show that an unlawful discriminatory intent motivated Verizon's actions. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 516, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Evidence of how Gulliford handled Moller's and Bennett's complaints about what one of Bennett's subordinates was doing does not show that a discriminatory reason likely motivated Gulliford to fire Bennett, or that his proffered explanation is unworthy of credence. That the investigation did not progress is logically explained by Bennett's attitude about the report of McKay's rumor-spreading, and the fact that both individuals had left Verizon within days of Gulliford first learning of the problem. Contrary to Bennett's contention, the Court determines that the lack of any further investigation does not support the conclusion that Verizon fired her in retribution for engaging in a protected act.

McKay never disciplined

In her fifteenth reason why summary judgment should not be granted to Verizon, Bennett argues that since McKay was never disciplined, "a jury could reasonably have found that the plaintiff had satisfied her burden of proving that the defendant's proffered reasons for firing her (violating the Code of Conduct)

were pretextual." (Pl.'s Mem. of Law (*Docket No. 36*) at 16.) McKay was the individual whom Moller accused of spreading rumors about a close, intimate relationship between Moller and Bennett. As with the previous argument, the Court does not find a material issue of fact precludes summary judgment, or that the lack of discipline for McKay undermines the non-discriminatory reason proffered by Verizon.

CONCLUSION

Although the Court has previously found that Bennett met the *de minimus* requirement of showing she engaged in a protected activity, and that she was terminated in close temporal proximity to that activity, it also found that Verizon articulated a legitimate, non-discriminatory reason for Bennett's discharge. Having granted the motion to reconsider, the Court now reverses its prior decision (Docket No. 40) that a material issue of fact precluded summary judgment. Instead, having reviewed again the papers submitted on the original motion, and the papers submitted in connection with Verizon's motion to reconsider and Bennett's opposition thereto, the Court concludes "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c) (2007). Accordingly, Verizon's motion for summary judgment is granted and the Clerk is directed to enter judgment in Verizon's favor.

IT IS SO ORDERED.

DATED: January 23, 2008
Rochester, New York

ENTER.

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Court

APPENDIX C — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK DATED SEPTEMBER 18, 2007

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

No. 04-CV-6314 CJS

JULIE M. BENNETT,

Plaintiff,

v.

VERIZON WIRELESS,

Defendant.

DECISION AND ORDER

INTRODUCTION

Siragusa, J. This is an action pursuant to Title VII of the Civil Rights Act of 1964 and the New York State Human Rights Law ("NYHRL"), § 290, in which plaintiff Julie M. Bennett ("Bennett") contends that defendant Verizon Wireless ("Verizon") terminated her in retaliation for engaging in protected activity. Now before the Court is defendant's motion for summary judgment (# 17). For the following reasons, the motion is denied.

Appendix C

BACKGROUND

Verizon employed Bennett from July 12, 1999, until her termination on November 20, 2003. (Gulliford Decl. (Mar. 17, 2006) at 3, 11.) Bennett alleges that in the course of her employment at Verizon, Katrina McKay, a member of Bennett's Customer Service Representative team, spread rumors that Bennett and another member of Bennett's team, Diana Moller ("Moller"), were involved in a lesbian relationship and, in that regard, had gone to Canada to pursue their affair. She also alleges that Moller was being questioned about her sexual preferences. (Bennett Aff. (Aug. 28, 2006) ¶ 58.) Bennett contends that she considered these circumstances to constitute a hostile working environment and that on September 10, October 2, October 22, and October 24, 2003, she took her complaints to her supervisor, Associate Director Pat Savino ("Savino"). (*Id.* ¶¶ 60-67.) Savino, however, denies that such complaints were made. (Savino Dep. (Mar. 30, 2006) at 36, 49-50 .) On November 14, 2003, Bennett met with Buddy Gulliford ("Gulliford"), former director of the call center in Rochester, and, according to Bennett, told him that she was upset that her sexuality was being questioned and also told him that the rumors were affecting her "morale as far as the team goes" and that "the comments" were making Moller uneasy and affecting her performance. (Bennett Dep. (Jul. 7, 2005) at 110-14.) Gulliford maintains that Bennett was not concerned about the rumors spread by McKay (Gulliford Dep. at 36), never formally complained about them (*id.* at 55) and, in fact, laughed about them and thought

they were a joke (*id.* at 36, 50). On November 20, 2003, Verizon terminated Bennet's employment. (*Id.* at 11.)

As to Bennett's termination, Verizon alleges that on or about October 31, 2003, Mr. David Munoz, Bennett's fiancé, who was an authorized user on Bennett's consumer cellular account, placed a call to Verizon to angrily complain about fees he was charged. (Bennett Dep. (Jul. 7, 2005) at 16, 55-56, 90-91.) Verizon alleges that in attempting to resolve Mr. Munoz's concerns, Darryl Hunt, Associate Director of Customer Service, discovered that since May 2003, five of Bennett's direct reports[1] accessed and made changes to her consumer wireless account. (Gulliford Decl. (Jul. 13, 2006) at 8.) Verizon contends that Bennett's termination arose from the discovery that she allowed her direct reports to have access to her account and make changes to it, which it argues constitutes a violation of Verizon's Wireless' Code of Business Conduct. (Verizon Mem. of Law at 1-2.)

On July 7, 2004, Bennett filed a complaint in U.S. District Court, Western District of New York alleging that Verizon terminated her in retaliation for engaging in protected activity, namely complaining of a hostile work environment to her superiors, in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e and the NYHRL. Verizon argues that it is entitled to judgment as a matter of law because "Bennett could not have a

1. No definition of this phrase is given in Mr. Gulliford's declaration. The Court will assume it is a reference to someone who directly reported to Bennett as her manager.

good faith, reasonable belief that a single rumor regarding her sexual orientation . . . constituted a violation of Title VII and/or the [NY]HRL," (Verizon Mem of Law at 17), because "there is no evidence that Verizon Wireless understood her joking acknowledgment of the rumor to be 'opposition' to an unlawful practice" (*Id.* at 18) and because "[t]here is also no evidence to create a genuine issue of material fact regarding a causal connection between Bennett's alleged protected activity and her termination from employment," (*Id.* at 20), and because "Bennett has presented no evidence to suggest that [Verizon's reason for termination] is false and/or that the 'real' reason for her termination was retaliatory animus." (*Id.* at 23.)

STANDARDS OF LAW

Rule 56

The standard for granting summary judgment is well established. Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists. *See, Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). "[T]he movant must make a prima facie showing that the standard for obtaining summary judgment has been satisfied." 11 Moore's Federal

Practice, § 56.11[1][a] (Matthew Bender 3d ed.). "In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant may satisfy this burden by pointing to an absence of evidence to support an essential element of the nonmoving party's claim." *Gummo v. Village of Depew*, 75 F.3d 98, 107 (2d Cir. 1996) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)), *cert denied*, 517 U.S. 1190 (1996). Once that burden has been established, the burden then shifts to the non-moving party to demonstrate "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *Anderson v. Liberty Lobby, Inc* ., 477 U.S. 242, 250 (1986). To carry this burden, the non-moving party must present evidence sufficient to support a jury verdict in its favor. *Anderson*, 477 U.S. at 249. The parties may only carry their respective burdens by producing evidentiary proof in admissible form. Fed.R.Civ.P. 56(e). The underlying facts contained in affidavits, attached exhibits, and depositions, must be viewed in the light most favorable to the non-moving party. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Summary judgment is appropriate only where, "after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the non-moving party ." *Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir. 1993).

It is well settled that the party opposing summary judgment may not create a triable issue of fact "merely by submitting an affidavit that disputes his own prior sworn testimony." *Rule v. Brine, Inc.*, 85 F.3d 1002, 1011

(2d Cir. 1996) (citations omitted). Rather, such affidavits are to be disregarded. *Mack v. United States*, 814 F.2d 120, 124 (2d Cir. 1987) (citations omitted).

Courts must be "particularly cautious about granting summary judgment to an employer in a discrimination case when the employer's intent is in question. Because direct evidence of an employer's discriminatory intent will rarely be found, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997) (citations and internal quotations omitted). However, a plaintiff may not defeat a motion for summary judgment merely by relying upon "purely conclusory allegations of discrimination, absent any concrete particulars." *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985).

Title VII and the NYHRL

Title VII "makes it unlawful for an employer to discriminate against any individual with respect to the 'compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" *Richardson v. New York State Dep't of Correctional Servs.*, 180 F.3d 426, 436 (2d Cir. 1999) (citations omitted), *abrogated on other grounds, Kessler v. Westchester County Dept. of Social Servs.*, 461 F.3d 199 (2d Cir. 2006). However, "Title VII does not establish a 'general civility code' for the American workplace. Simple teasing, offhand comments,

or isolated incidents of offensive conduct (unless extremely serious) will not support a claim of discriminatory harassment." *Petrosino v. Bell Atlantic*, 385 F.3d 210, 223 (2d Cir. 2004) (citation omitted).

It is well settled that "claims brought under New York State's Human Rights Law are analytically identical to claims brought under Title VII." *Torres v. Pisano*, 116 F.3d 625, 629, n. 1 (2d Cir. 1997), *cert den.* 522 U.S. 997 (1997). Consequently, unless otherwise noted, references to Title VII below are also intended to refer to the NYHRL.

Retaliation

To establish a prima facie case of retaliation under Title VII, "a plaintiff must demonstrate participation in protected activity known to the defendant, an employment action disadvantaging the person engaged in the protected activity, and a causal connection between the protected activity and the adverse employment action." *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2d Cir. 2000) (citations and internal quotations omitted). Making a complaint regarding harassment to one's supervisor is "protected activity" under Title VII. *Id.*

Retaliation claims are analyzed using the three-tier burden-shifting test "set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny." *Valentine v.Standard & Poors*, 50 F.Supp.2d 262, 281-82 (S.D.N.Y. 1999) (citations and internal quotations

omitted), *aff'd*, 205 F.3d 1327 (2d Cir.2000); *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2d Cir.2001). Under the first tier of the *McDonnell Douglas* test, the plaintiff must establish a prima facie case.[2] If the plaintiff establishes a prima facie case,

> the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's discharge [or other adverse employment action]. At this stage, the employer need only articulate-but need not prove-the existence of a nondiscriminatory reason for its decision. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Once defendant meets its burden of production, the burden shifts back to plaintiff. Under the third tier of the *McDonnell Douglas* test, plaintiff bears the ultimate burden of proving that the reason proffered by the employer is a pretext for unlawful discrimination. In order to survive a motion for summary judgment, plaintiff must establish a genuine issue of material fact as to whether the employer's reason . . . is false and as to whether it is more

2. It is clear that "the burden of proof that must be met to permit an employment-discrimination plaintiff to survive a summary judgment motion as the prima facie stage is *de minimis*." *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) (citation and internal quotation marks omitted).

> likely that a discriminatory reason motivated the employer to make the adverse employment decision.

Valentine, 50 F.Supp.2d at 281-82 (Citations and internal quotations omitted); *see also, Terry v. Ashcroft*, 336 F.3d 128, 137-38 (2d Cir. 2003).

At the third tier of the McDonnell Douglas test, simply proving that the employer's proffered reason was false may, or may not, establish the required proof of discriminatory intent:

> The ultimate question is whether the employer intentionally discriminated, and proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason is correct." In other words, "it is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination."

Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 146-47 (2000) (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993). In this regard, "[t]he relevant . . . the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports or undermines the employer's case." *Id.* at 148.

Appendix C

ANALYSIS

Bennett Engaged in Protect Activity

Verizon first claims that Bennett has failed to establish a prima facie case because she did not engage in protected activity, specifically arguing that "Bennett could not have a good faith, reasonable belief that a single rumor regarding her sexual orientation . . . constituted a violation of Title VII and/or the [NYS]HRL." (Verizon Mem. of Law at 17.) It is settled principle that a "plaintiff need not establish that the conduct [s]he opposed was in fact a violation of Title VII" in order to constitute protected activity. *Manoharan v. Columbia Univ. College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988); *see also Wimmer v. Suffolk Co. Police Dept.*, 176 F.3d 125, 134 (2d Cir.1999) (citation omitted); *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir. 1996) (citation omitted). Rather, "the plaintiff must demonstrate a 'good faith, reasonable belief that the underlying challenged actions of the employer violated the law.'" *Manoharan*, 842 F.2d at 593 (citations omitted).

In this case, it was not unreasonable for Bennett to believe that Verizon subjected her to a hostile working environment in violation of Title VII. For a plaintiff to prevail on a hostile work environment claim, "she must prove that the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Perry v. Ethan Allen Inc.*, 115 F.3d 143,

149 (2d Cir. 1997) (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)). "However, a single act can create a hostile working environment if it in fact 'work[s] a transformation of the plaintiff's work place.' " *Feingold v. New York*, 366 F.3d 138, 150 (2d Cir. 2004) (quoting *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir. 2002)) (alteration in original). Here, Bennett alleges that "the rumor that Moller and I were involved in a lesbian relationship, that Moller and I had gone to Canada for an affair, and that Moller was being questioned about her sexual preferences [ ] constitute[d] a hostile work environment." (Bennett Aff. at 16-17.) The Court cannot say, as a matter of law, that rumors regarding one's sexuality, and more specifically rumors of involvement in a lesbian affair, as well as the questioning of a subordinate's sexual preferences, could not constitute a hostile work environment. Because these circumstances could give rise to such an environment, it was not unreasonable for Bennett to believe, in good faith, that these rumors and statements constituted a hostile working environment.

The evidence also shows that Bennett opposed the activity that she, in good faith, believed violated the law. "While the law is clear that opposition to a Title VII violation need not rise to the level of a formal complaint in order to receive statutory protection, this notion of 'opposition' includes activities such as 'making complaints to management. . ..'" *Cruz*, 202 F.3d at 566 (citation omitted). Bennett alleges that she first made complaints of a hostile work environment to Savino on September 10 and continued to report her complaints

to Savino on October 2, 22, and 24, 2003, (Bennett Aff. 16-18). Although Savino denies that Bennett ever complained to her about a hostile working environment, (Savino Dep. 36, 46-49, 76, 89-90), for purposes of Verizon's application, allegations contained in her affidavit must be taken as true. *See Burtnieks v. City of New York*, 716 F.2d 982, 983-984 (2d Cir.1983) ("As a preliminary matter, we note that . . . factual allegations in the pleadings of the party opposing the motion for summary judgment, if supported by affidavits or other evidentiary material, should be regarded as true by the district court.") (citation omitted). Therefore, evidentiary proof in the record shows that Bennett complained to Savino regarding a hostile work environment on September 10, October 2, October 22, and October 24, 2003.

Bennett also alleges that she raised her complaints to Gulliford in a meeting on November 14, 2003. (Bennett Aff. 24-30). Here, though, she admits that she did not tell Gulliford that she thought she was working in a "sexually-hostile work environment." (Bennett Dep. 112-113.) Nevertheless, despite Gulliford's failure to perceive her statements as a formal complaint (Gulliford Dep. at 55), and his belief that she regarded the rumors as a joke (*id.* at 36, 50), in drawing all reasonable inferences from the pleadings in favor of Bennett, the Court finds that she did complain to Gulliford regarding rumors questioning her and Moller's sexuality.[3] (Bennett

3. Plaintiff's best evidence that she "complained" to Gulliford regarding the rumors questioning her sexuality is found in her deposition. In pertinent part, the deposition reads:

(Cont'd)

Aff. 24-30); (Bennett Dep. 112-14.) Bennett has shown that she engaged in protected activity when she complained to Savino and Gulliford of the activity that she believed, in good faith, to be a violation of Title VII.

Verizon Was Aware of Bennett's Protected Activity

Verizon further argues it was not aware of Bennett's alleged protected activity because "there is no evidence that Verizon Wireless understood her joking acknowledgment [to Gulliford] of the rumor to be 'opposition' to an unlawful practice." (Verizon Mem. of Law at 18.) However, as previously mentioned, Bennett "opposed" an activity that she believed, in good faith, to be a violation of the law in her September 10, October 2, October 22, and October 24, 2003, complaints to Savino and in her November 14, 2003, complaint to Gulliford. Thus, Verizon became aware of her protected activity on those dates. *See Gordon v. New York City*

(Cont'd)

> Q. Did you state you felt uncomfortable or uneasy?
>
> A. At that time we were talking about everything else that was going on, and I had told him what made me upset was my being questioned and the integrity issue that was being handled.
>
> Q. You being questioned and the integrity issue-
>
> A. As far as my sexuality being questioned by a subordinate and why Diana was getting the projects that she was getting.

(Bennett Dep. at 113.)

Board of Education, 232 F.3d 111, 116 (2d Cir. 2000) ("Neither this nor any other circuit has ever held that, to satisfy the knowledge requirement, anything more is necessary than general corporate knowledge that the plaintiff has engaged in a protected activity.").

A Causal Connection Exists Between Bennett's Protected Activity and the Adverse Employment Action

Additionally, Verizon maintains that there is "no evidence to create a genuine issue of material fact regarding a causal connection between Bennett's alleged protected activity and her termination from employment." (Verizon Mem. of Law at 20.) Verizon first claims that because "the information regarding Bennett's cell phone account first came to light on October 31, 2003, two weeks before her conversation with Buddy Gulliford," an inference of retaliation cannot be made. (*Id.* at 21.) Indeed, this Circuit has held that "[w]here timing is the only basis for a claim of retaliation, and gradual adverse actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise." *Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87, 95 (2d Cir. 2001). Here, however, Bennett engaged in protected activity on September 10, October 2, October 22, and October 24, 2003, in meetings with Savino, and also on November 14, 2003, in her meeting with Gulliford. (Bennett Aff. 16-30.) In other words, Bennett's protected activity occurred both before and after Verizon discovered the activity on Bennett's wireless account,

which it claims led to her termination. (Verizon Mem. of Law at 2.) Consequently, the principle that an inference of retaliation cannot be made where adverse actions began well before the plaintiff engaged in protected activity does not apply.

Verizon also argues that, even assuming Bennett complained to Savino on September 10, 2003, "there is no evidence that Pat Savino ever made Buddy Gulliford or the Human Resources Department aware of that alleged protected activity, which precludes any finding of retaliation." (*Id.* at 21.) In an analysis of causation, it is relevant that decision-makers who authorize an adverse employment action, lack knowledge of the protected activity. *See Gordon*, 232 F.3d at 117 ("The lack of knowledge on the part of particular *individual agents* is admissible as some evidence of a lack of a causal connection, countering plaintiff's circumstantial evidence of proximity or disparate treatment.") (emphasis in original) (citation omitted). In this case, though, regardless of whether Savino made Gulliford aware of Bennett's protected activity, Gulliford himself became aware of the protected activity in his November 14, 2003, meeting with Bennett. Therefore, an inference of retaliation can be made where Bennett's termination was on November 20, 2003.

Verizon further maintains that, assuming Bennett complained to Savino on September 10, 2003, the passage of time between her complaint and the adverse employment action do not support an inference of retaliation. (Verizon Mem. of Law at 21-22.) Indeed,

"[p]roof of the causal connection can be established indirectly by showing that the protected activity was closely followed in time by the adverse action." *Manoharan*, 842 F.3d at 593 (citation omitted). The Second Circuit has not adopted a bright-line rule regarding the causal connection between engagement in a protected activity and the temporal proximity of a subsequent adverse employment action. *See Gorman-Bakos v. Cornell Cooperative Extension of Schenectady County*, 252 F.3d 545, 554 (2d Cir. 2001) (*comparing Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769 (2d Cir. 1998) (discharge less than two months after plaintiff filed a sexual harassment complaint with management and ten days after filing complaint with state human rights office satisfactory to provide prima facie evidence of a causal connection between protected activity and retaliation); *and Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 45-46 (2d Cir. 1980) (eight-month gap between EEOC complaint and retaliatory action suggested a causal relationship), *with Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85-86 (2d Cir. 1990) (passage of three months not sufficient to establish causal connection). In this case, Bennett engaged in protected activity in her September complaint to Savino, in her several October complaints to Savino, and in her November 14 meeting with Gulliford. (Bennett Aff. 16-30.) Verizon terminated Bennett six days after her meeting with Gulliford. (*Id.* at 32.) In viewing Circuit precedent cited above, the Court concludes that such a short interval of time is sufficient to indirectly establish a causal connection between the protected activity and adverse employment action.

In summary, the Court finds that Bennett engaged in protected activity in her complaints to Savino and Gulliford, that Verizon was aware she opposed activity she believed to be a violation of law, and that a causal connection exists between Bennett's protected activity and her termination. As a result, the Court finds that the plaintiff has sufficiently demonstrated her prima facie case.

The Court also finds that Verizon has articulated a legitimate, non-discriminatory reason for Bennett's discharge. Verizon asserts that it terminated Bennett's employment due to a violation of Verizon Wireless' Code of Business Conduct ("the Code"), "specifically [for] her instructing her employees to access and complete transactions on her cellular account." (Verizon Mem. of Law at 13.) In relevant part, the Code states that:

> Our legal and Company requirements governing privacy require that you **do not:**
>
> **– Access your personal wireless account information, or those of family or friends, without prior approval by your supervisor. Access includes, but is not limited to, issuing credits/adjustments, altering account information, or making payments or equipment changes. . . .**
>
> Violations of the law, Our Code, and other Company policies, procedures, instructions, practices and the like can lead to disciplinary

> action up to and including termination from employment. Such disciplinary action may also be taken against supervisors or executives who condone, permit or have knowledge of illegal, unethical or other improper conduct and do not take appropriate action. . . .
>
> No one, regardless of level or position, is ever authorized to direct an employee or a contractor to commit an illegal or improper act on Company premises, while working for Verizon Wireless or on behalf of Verizon Wireless.

(Bennett App., Vol. II, Ex. H, at 66-67, 75-76[4] (emphasis in original).) Here, it is undisputed that Bennett instructed her subordinates to access her account in order to alter account information and to make payments on the account using Bennett's credit card without permission from Bennett's supervisor. (Bennett Dep. at 58-60.) In viewing Code policies above, the Court finds that Bennett's decision to instruct her subordinates to engage in activity on her behalf which would otherwise be a direct violation of the Code if she engaged in the activity herself is a sufficiently legitimate, non-discriminatory reason for her termination.

---

4. Volume II consists of Exhibit A through Exhibit KK. There are no page numbers listed for Volume II or each individual exhibit. The page numbers used here refer to the number of pages within Volume II where the documents are found.

Appendix C

As to the ultimate question of whether Bennett has presented sufficient evidence from which a reasonable trier of fact could find retaliation, the Court finds that a genuine issue of material fact exists which precludes summary judgment. Lucy Courvertier,[5] a former Verizon employee who was terminated for making changes to her family members accounts without prior approval from her supervisor, has stated that "I had routinely made changes to not only my family and friends' accounts with the prior approval of my supervisor, but to the accounts of my supervisor's family and friends' accounts, all with prior approval by the same supervisor, and that this was common practice." (Bennett App., Vol. III, Ex. B, Courvertier Aff.) If supervisors in a similar position to Bennett regularly gave permission to their subordinates to access the accounts of the supervisor's friends and family, and if these particular supervisors did not have permission to do so from their own supervisor, and if such activity went undisciplined, such a fact could help prove that Verizon's stated reason for termination was pretextual.

CONCLUSION

For the foregoing reasons, Verizon's motion (# 17) for summary judgment is denied.

SO ORDERED.

---

5. This individual's name is spelled both as "Couvertier" and "Courvertier" in her affidavit.

Appendix C

Dated: September 18, 2007
Rochester, New York

ENTER.

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge

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(2)

No. 09-141

Supreme Court, U.S.
FILED
OCT 2 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JULIE M. BENNETT,

Petitioner,

v.

VERIZON WIRELESS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons to grant the Petition, where the Second Circuit's Summary Order affirming the District Court's analysis of Petitioner's evidence did not require "pretext plus," but instead determined that Petitioner had failed to demonstrate a genuine issue of material fact regarding pretext, following this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)?

2. Whether Petitioner has presented compelling reasons to grant the Petition, where she relies upon temporal proximity alone to establish pretext with respect to a retaliation claim?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Cellco Partnership d/b/a Verizon Wireless is a Delaware general partnership, the partnership interests of which are indirectly owned by Verizon Communications, Inc. and Vodafone Group Plc, both of which are publicly traded corporations.

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OPINIONS AND ORDERS BELOW

The U.S. District Court for the Western District of New York (Siragusa, J.) initially denied Respondent's motion for summary judgment. *See Bennett v. Verizon Wireless*, 2007 U.S. Dist. LEXIS 87522 (W.D.N.Y. Sept. 18, 2007). Upon reconsideration, however, the District Court granted summary judgment to Verizon Wireless. *See Bennett v. Verizon Wireless*, 2008 U.S. Dist. LEXIS 3373 (W.D.N.Y. Jan. 24, 2008). The U.S. Court of Appeals for the Second Circuit affirmed the District Court's judgment in a summary order. *See Bennett v. Verizon Wireless*, 326 Fed. Appx. 9, 2009 U.S. App. LEXIS 9566 (2nd Cir. May 1, 2009).

INTRODUCTION

Petitioner has presented no "compelling reasons" for her Petition for a Writ of Certiorari to be granted. *See* Sup. Ct. R. 10. Petitioner's suggestion that the Second Circuit applied the "pretext plus" standard rejected by this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.* is misplaced, as both the District Court and the Second Circuit in this case determined that Petitioner failed to demonstrate pretext itself and thus never reached the issue of whether she did (or needed to) present additional evidence to withstand Respondent's motion for summary judgment.

Petitioner also failed to demonstrate any Circuit split on the issue of whether temporal proximity between an employee's protected activity and termination, by itself, can establish pretext. Petitioner incorrectly asserts that the Second Circuit has determined that

temporal proximity alone is sufficient. The Second Circuit has not addressed that issue, but the Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have all determined that temporal proximity alone cannot establish pretext.

Therefore, Petitioner wholly failed to carry her burden of demonstrating any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

Verizon Wireless, a wireless communications provider, employed Petitioner Julie Bennett ("Bennett") from July 1999 to November 2003, when her employment was terminated because Bennett violated Verizon Wireless' Code of Business Conduct. A: 10, 73.[1] Ms. Bennett was a Customer Service Supervisor at the time of her termination. A: 12, 74.

I. Verizon Wireless' Policies & Procedures

Many of Verizon Wireless' policies and procedures are contained in its Code of Business Conduct. A: 248-283. To reinforce the importance of these policies and to make sure they are known and understood by all employees, Code of Business Conduct training is provided periodically and reinforced through various means, including e-mails, e-training, company

[1] References are to the Joint Appendix ("A:") or the Special Appendix ("SPA:") filed with the U.S. Court of Appeals for the Second Circuit.

publications, brochures and postings in the workplace. A: 11, 75, 125, 200. Verizon Wireless' policies and procedures are also discussed in regularly held supervisor meetings. A: 76.

To ensure the privacy of customer communications and the integrity of Verizon Wireless employees, the Code of Business Conduct prohibits employees from accessing account information from their own accounts or those of family and friends:

> Our **legal** and Company requirements governing privacy require that you ***do not***:
>
> Access your personal wireless account information, or those of family or friends, without prior approval by your supervisor. Access includes, but is not limited to, issuing credits/adjustments, altering account information, or making payments or equipment changes.

See A: 270-271 (emphasis in original); *see also* A: 11, 101, 176-177, 190. Additionally, the Code of Business Conduct specifically requires that supervisors enforce its provisions and do nothing to condone or encourage violations:

> Violations of the law, Our Code, and other Company policies, procedures, instructions, practices and the like can lead to disciplinary action up to and including termination from employment. Such disciplinary action may also be taken against supervisors or executives

> who condone, permit or have knowledge of illegal, unethical or other improper conduct and do not take appropriate action.... No one, regardless of level or position, is ever authorized to direct an employee or a contractor to commit an illegal or improper act on Company premises, while working for Verizon Wireless or on behalf of Verizon Wireless.

A: 280-281; *see also* A: 195.

II. Cell Phone Account Access

On or about October 31, 2003, Mr. Darryl Hunt, Associate Director – Customer Service, advised Mr. Gulliford of questionable activities on Ms. Bennett's cellular account. On October 31, 2003, Mr. David Munoz, Ms. Bennett's fiancé and an authorized user on her consumer cellular account, called in to the Customer Service Call Center to complain about additional text messaging fees that he had incurred. Mr. Munoz was extremely upset during the call. As a result, Mr. Munoz's call was escalated. Both the representative who originally handled the call and the Lead Customer Service Representative to whom the call was escalated felt uncomfortable with Mr. Munoz's request for a credit on the bill. In addition, the Lead Representative that handled the escalation indicated that she felt that Mr. Munoz exerted pressure on her to apply credit to the account based on Mr. Munoz's relationship (fiancé) with Ms. Bennett and her position of authority at Verizon Wireless. After reviewing the credit request, the Company determined that a bill adjustment was not warranted. A: 16-17, 167-169, 172-173.

In attempting to resolve Mr. Munoz's concerns, Mr. Hunt discovered some questionable activity on the account. Specifically, several Verizon Wireless employees with whom Ms. Bennett worked closely had accessed and made changes to Ms. Bennett's account. Specifically, since May 2003, five of Ms. Bennett's direct reports – including Diana Moller – had accessed her account and performed various transactions. These transactions included credit card payments using her personal credit card, the initiation of a name change and an address change. A: 17, 335-347.

Ms. Bennett admits instructing employees on her team to make changes to her personal wireless account. A: 78, 97-99. Bennett also admits that it would be a violation of the Code of Business Conduct for those employees to have accessed her account if they did not have her permission to do so. A: 107. However, she believes that the changes being made to her account were "not significant enough" to warrant discipline. A: 108. Bennett did not obtain her supervisor's permission for access to her cell phone account. A: 238-247.

On Friday, November 14, 2003, Mr. Gulliford met with Ms. Bennett, at her request, to discuss a number of issues including Ms. Bennett's concerns with a particular employee on her team (Ms. Katrina McKay). In addition, and prior to the meeting, Mr. Gulliford had decided to speak with Ms. Bennett about the transaction activity found on her cellular account. A: 17.

Mr. Gulliford and Ms. Bennett spent quite some time discussing the issue concerning Ms. McKay. Ms. Bennett

was concerned that Ms. McKay was having a negative influence on the rest of the team by engaging in call avoidance behaviors. Ms. Bennett had already brought these concerns to Ms. Savino's attention, but disagreed with how Ms. Savino had handled the situation. After reviewing the specifics regarding Ms. McKay's call avoidance incidents, Ms. Savino had decided to send out a reminder to the entire team that these behaviors were not acceptable. Ms. Bennett disagreed with this approach and felt that Ms. McKay was being treated too leniently. A: 17.

When it came time to discuss the activity on Ms. Bennett's cellular account, Mr. Gulliford began by asking Ms. Bennett to share with him her understanding of the Company's position, as set forth in the Code of Business Conduct, regarding an employee accessing another employee's cellular account. According to Mr. Gulliford, Ms. Bennett replied that it was not acceptable for employees to do this and that these actions would be clear violations of the Code of Business Conduct. He then asked Ms. Bennett why several of her direct reports had accessed her cellular account numerous times and made changes on her account. Ms. Bennett began by stating that the account that had been accessed was a consumer account, not an employee account. When she recognized that she had just acknowledged that employees had accessed her account, Ms. Bennett stated that she would never ask anyone from her team to access her personal account, thereby jeopardizing their employment. A: 17-18, 118.

Ms. Bennett then stated that the only thing she asked the employees to do was apply payments using

her personal credit card. Mr. Gulliford advised Ms. Bennett that based upon the records obtained through the billing system, it was clear that one of her employees, Ms. Diana Moller, had completed an address change and initiated a name change. Mr. Gulliford expressed concern that Ms. Bennett would knowingly place her team members' jobs at risk by asking them to complete these transactions on her behalf. Ms. Bennett responded by saying that she would never do anything to put her employees in jeopardy. A: 18.

Mr. Gulliford also shared with Ms. Bennett the perception issue she had created by asking certain members of her team to work on her account and not others, particularly with other morale and favoritism issues on her team. *See* A: 177. In conclusion, he asked Ms. Bennett to consider the fact that one of the individuals (Ms. Moller) whom she asked to make changes to her account was a personal friend with whom she had recently traveled out of state. Mr. Gulliford reminded Ms. Bennett of the importance of keeping personal and work relationships separate to avoid conflicts. A: 18.

Just two days before, Mr. Gulliford had met with Diana Moller concerning a disciplinary issue – Moller had been given a Written Warning by Bennett for inappropriate e-mails and wanted him to reduce it to a verbal warning – and Moller had raised with Mr. Gulliford that she was concerned about an alleged rumor in the workplace. Moller stated that she had heard from co-worker Amy Evans that co-worker Katrina McKay had been spreading a rumor about an alleged intimate relationship between Bennett and

Moller, including that they had traveled to Canada together. Apparently, Ms. Bennett and Ms. Moller had gone to North Carolina together, but not Canada. A: 19, 90-91, 108, 134-136, 146-148.

Given Ms. Moller's concern about this rumor, Mr. Gulliford informed human resources that evening (November 12, 2003) that the issue had been raised. A: 137-138, 153-155, 187. However, Ms. Moller resigned on November 14, 2003 before any investigation could begin, other than Mr. Gulliford's conversation with Ms. Bennett on that date, which is discussed below. A: 19, 157-159.

At the end of their conversation with Ms. Bennett on November 14, Mr. Gulliford and Ms. Bennett briefly discussed the alleged relationship between Ms. Bennett and Ms. Moller. Ms. Bennett did not appear to take the issue very seriously and, in fact, seemed to find the topic somewhat amusing. Ms. Bennett informed Mr. Gulliford that the rumors regarding a relationship between the two had been circulating since July, that Mr. Munoz, Ms. Bennett's fiancé, was also aware of the rumors, and that they had both just laughed about it. A: 19, 140, 151, 159-160, 184, 188.

After his own sexuality – Mr. Gulliford is a gay man – was brought up by Bennett's counsel during his deposition, Mr. Gulliford testified that he believes that he is more sensitive to issues such as rumors about sexuality in the workplace, but that Bennett did not complain about the alleged rumor and expressed no concern about it. A: 126, 129.

Bennett admits that she did not complain to Mr. Gulliford regarding alleged harassment in the workplace. A: 118-119; *see also* A: 153, 157-159, 166, 180. Although Bennett claims she complained to her direct supervisor Pat Savino about the rumor concerning her relationship with Diana Moller, she has no documentation of any of those meetings/conversations (A: 117); her own timeline (A: 303-306) does not document any such conversations; and she lost her calendar that might note when such conversations occurred. A: 116. Mr. Gulliford very clearly expressed to Ms. Bennett that he was concerned that such rumors were circulating, but that it might be difficult to ascertain the source since the information was coming second and third hand. Mr. Gulliford nevertheless informed Ms. Bennett that he would further investigate the matter. He also impressed upon Ms. Bennett the importance of abiding by the Company's policies, including the Company's policy on relationships at work. A: 19.

After reviewing the information that had been obtained through the company's billing system and from discussions with Ms. Bennett, Verizon Wireless determined that Ms. Bennett's employment should be terminated for violations of the Code of Business Conduct, specifically her instructing her employees to access and complete transactions on her cellular account. Verizon Wireless' policies are clear on employees either accessing their own accounts or directing others with whom they work to access their accounts. Both such actions are prohibited and the Company routinely terminates the employment of individuals who engage in either sort of activity. Ms. Bennett was terminated effective November 20, 2003. A: 20, 161-164, 179, 237, 246-247.

Bennett admits that she has no idea why Verizon Wireless was looking into her account status. A: 114-115. In any event, the information regarding Ms. Bennett's cellular account both came to light ***before*** Mr. Gulliford's conversation with Bennett on November 14, 2003, when they first discussed the alleged rumor. A: 15-17, 21.

The same documentation that led to Bennett's termination (A: 335-347) revealed that Lucy Munoz, another Verizon Wireless employee and the sister of David Munoz, had swapped out an upgraded phone on the account for reasons of "customer satisfaction." Ms. Munoz, who had not complained about any alleged discrimination and/or harassment in the workplace, also lost her employment for inappropriately accessing the account of a family member (Mr. Munoz was using Ms. Bennett's account). A: 20.

III. Post-Termination Events

On or about December 26, 2003, Ms. Bennett filed an EEOC Charge. A: 21, 348-350. On April 30, 2004, the EEOC issued a Determination Letter and Notice of Right to Sue. The EEOC determined that Verizon Wireless had shown a legitimate, non-retaliatory reason for terminating Ms. Bennett. A: 21, 351-354.

IV. Verizon Wireless' Motions for Summary Judgment and Reconsideration

On July 17, 2006, Verizon Wireless filed a Motion for Summary Judgment. On September 19, 2007, the District Court issued a Decision and Order denying

Verizon Wireless' Motion for Summary Judgment. A. 1237-1252. In its Decision and Order, the District Court first determined that Bennett met her *de minimis* burden to demonstrate a *prima facie* case of retaliation. A: 1244-1250. Notably, the only evidence of a causal connection between Bennett's alleged protected activity and her termination from employment was the close temporal proximity between the two events. A: 1247-1250.

The Court then determined that Verizon Wireless met its burden to articulate a legitimate, non-discriminatory reason for Bennett's termination from employment. In particular, the undisputed facts showed that Bennett "instructed her own subordinates to access her account in order to alter account information and to make payments on the account using Bennett's credit card without permission from Bennett's supervisor," leading the Court to find that "Bennett's decision to instruct her subordinates to engage in activity on her behalf which would otherwise be a direct violation of the Code if she engaged in the activity herself is a sufficiently legitimate, non-discriminatory reason for her termination." A: 1251.

With respect to the pretext analysis, the Court found a genuine issue of material fact based on the affidavit of Lucy Couvertier (formerly Lucy Munoz), a former Verizon Wireless employee. A: 1251-1252. Ms. Couvertier's affidavit states that she was terminated for making changes to a family member's account with no prior permission from her supervisor. A: 1156. In fact, it is undisputed that Ms. Couvertier, an employee in a Verizon Wireless store located in Buffalo who had not

engaged in protected activity, was terminated for violating the same policy that Bennett violated. That policy prohibited Verizon Wireless employees from accessing their own cellular accounts or those of family and friends. Couvertier had swapped out one phone for another on Ms. Bennett's personal cellular phone account, which was being used by Bennett's fiancé, David Munoz, who was Lucy Munoz's brother. A: 20.

Ms. Couvertier further alleged that she "routinely made changes to not only my family and friends' accounts with the prior approval of my supervisor, but to the accounts of my supervisor's family and friends' accounts, all with prior approval by that same supervisor, and that this was common practice." A: 1156. Ms. Couvertier, at most, alleged that a single, unnamed supervisor engaged in similar conduct to Bennett's without repercussion. Her conclusion that this was "common practice" without any foundation is at best inadmissible hearsay. But, the Court relied on this statement to find that genuine issues of material fact exist with respect to pretext. Focusing on the Couvertier Affidavit, the Court stated:

> ***If*** supervisors in a similar position to Bennett regularly gave permission to their subordinates to access the accounts of the supervisor's friends and family, and ***if*** these particular supervisors did not have permission to do so from their own supervisor, and ***if*** such activity went undisciplined, such a fact could help prove that Verizon's stated reason for termination was pretextual.

A: 1251-1252 (emphasis supplied). The problem with this statement was that Bennett did not present evidence to show: (1) that any supervisor other than the unnamed supervisor mentioned by Couvertier gave a subordinate permission to access the supervisor's cellular account or that of a family member or friend; (2) that Couvertier's supervisor in the Buffalo Walden Avenue store was similarly situated to Bennett in the Rochester call center; (3) that Couvertier's supervisor did not have permission from his/her supervisor to allow access to his/her cellular account or that of a family member or friend; and (4) that the conduct of Couvertier's supervisor was known to the decision makers in the Bennett case (or any other supervisor for that matter), and that the known activity went undisciplined.

In fact, the only evidence in the record on that latter issue was the following sworn statement by Mr. Gulliford:

> While I was Director of the Verizon Wireless Call Center in Rochester, New York, I did not become aware of any other circumstance where a supervisor allowed or instructed one of her subordinates to access and/or make changes to that supervisor's account. If I had been aware of any such activity, it would be investigated as a violation of the Code of Business Conduct, and appropriate disciplinary action would be taken if such activity were substantiated.

A: 20. Bennett presented no evidence of any kind to contradict this statement, as the Couvertier Affidavit does not address the knowledge issue at all.

Based on the foregoing, Verizon Wireless moved for reconsideration, arguing that the Couvertier Affidavit did not provide evidence that would support the conclusion that Verizon Wireless' legitimate, non-discriminatory reason for terminating Bennett was a pretext for retaliation.

The District Court granted Verizon Wireless' Motion for Reconsideration and granted summary judgment to Verizon Wireless. SPA: 1-22. First, the District Court agreed that the Couvertier Affidavit "does not support Bennett's argument that a similarly-situated employee was treated more favorably." SPA: 6. Having concluded that the Couvertier Affidavit did not create a genuine issue of material fact regarding pretext, Judge Siragusa then went on to discuss in detail numerous other allegations Bennett put forth as purported evidence of pretext. SPA: 6-21. Judge Siragusa concluded that Bennett's proffered evidence of pretext failed to create a genuine issue of material fact and therefore that Verizon Wireless was entitled to judgment as a matter of law. SPA: 21-22. Judgment was entered for Verizon Wireless (SPA: 23).

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed the District Court in a Summary Order. Citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Second Circuit agreed that Bennett failed to demonstrate a genuine issue of material fact regarding pretext.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any Court of Appeals, nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried her burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The Second Circuit Did Not Require "Pretext Plus" and Otherwise Properly Followed This Court's Decision in *Reeves v. Sanderson Plumbing Products, Inc.*

Bennett claims that the District Court and the Second Circuit applied a "pretext plus" requirement that was rejected by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Pet., pp. 33-34. Petitioner mischaracterizes both *Reeves* and the decisions below.

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), this Court determined that a fact finder's rejection of an employer's legitimate, non-discriminatory reason for its action did not compel judgment for a plaintiff. *Id.* at 511. Rather, the falsity of the employer's explanation for its action could lead to an inference that the employer intentionally discriminated or retaliated against a plaintiff, but not necessarily in all cases. *Id.* at 511 ("Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.") (emphasis in original). The plaintiff still bears the ultimate burden to prove that intentional

discrimination or retaliation occurred, notwithstanding the falsity of the employer's explanation. *Id.* at 519 ("[I]t is not enough . . . to *dis*believe the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination.") (emphasis in original).

In *Reeves*, the issue before this Court was whether the plaintiff's *prima facie* case was enough to satisfy his/her ultimate burden of proving discrimination once he/she had demonstrated that the employer was not being truthful about its actions. The Fifth Circuit in *Reeves* had concluded that a plaintiff was always required to show more than the falsity of the employer's explanation – *i.e.*, "pretext plus" – and could not rely simply on the evidence used to demonstrate the *prima facie* case in order to sustain his/her ultimate burden of proof.

This Court in *Reeves* rejected the notion of "pretext plus" and determined that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148. However, consistent with *St. Mary's Honor Center*, this Court did not state that such evidence would always suffice, thus not precluding judgment as a matter of law for employers in all cases where the employer's proffered explanation has been shown to be false:

> Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

> This is not to say that such a showing by the plaintiff will *always* be adequate [for judgment as a matter of law]. . . . For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. . . .
>
> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.

Id. at 148-149 (emphasis in original; citations omitted).

Petitioner suggests that the Second Circuit still applies the "pretext plus" standard after *Reeves*. Pet., pp. 33-35. The Second Circuit disagrees. *See James v. New York Racing Assoc.*, 233 F.3d 149 (2nd Cir. 2000) (finding *Reeves* "wholly compatible and harmonious" with Second Circuit precedent). Petitioner's argument is likely the result of her apparent fundamental misunderstanding of the decisions below. The courts below determined that Petitioner had failed to

demonstrate a genuine issue of material fact regarding pretext itself, *i.e.*, whether Verizon Wireless' reason for terminating Petitioner was false. Thus, whether something more was required to withstand a motion for summary judgment was never an issue.

The District Court rejected Petitioner's assertion that temporal proximity alone was enough to establish pretext and addressed all fifteen alleged indicia of pretext. Pet., App. B, pp. 11a-31a. The District Court concluded that "there is an insufficient basis for a trier of fact to doubt the persuasiveness of the [sic] Verizon's proffered evidence and ultimately to find that the reasons offered by them [sic] for Bennett's dismissal were pretextual." Pet., App. B., p. 13a.

Similarly, the Second Circuit concluded that Petitioner failed to satisfy her burden of showing "that the employer's action against her was taken in retaliation for her complaints. . . . On the evidence submitted, a finder of fact could not have reasonably found that the employer's stated reasons were pretext and that the employer was in fact motivated by retaliation." Pet., App. A, p. 3a (citing *Reeves*).

These determinations are perfectly consistent with *St. Mary's Honor Center* and *Reeves*. Both of those cases involved the implications of demonstrating that an employer's explanation for its actions was false. *St. Mary's Honor Center* held that demonstrating the falsity of the employer's explanation did not require judgment as a matter of law for the plaintiff while *Reeves* held that it could support judgment for the plaintiff in some cases, but did not preclude judgment as a matter of law for the defendant.

Here, the District Court and the Second Circuit both determined that Petitioner had failed to create a genuine issue of material fact as to the alleged falsity of Respondent's explanation for Petitioner's dismissal. Having not even passed that hurdle, Petitioner's reliance on *Reeves* is misplaced and there is no basis to suggest that the Second Circuit does not follow *Reeves* generally or did not follow *Reeves* in this case.

II. There is Complete Agreement Among the Circuits that Temporal Proximity Alone is Insufficient to Establish Pretext for a Retaliation Claim

Given the District Court's and Second Circuit's rejection of her proffered evidence of pretext, Petitioner not surprisingly argues that temporal proximity alone is sufficient to establish a genuine issue of material fact regarding pretext, and suggests that there is a Circuit split in this regard. Pet., pp. 34-35. There is no Circuit split on this point, and for good reason.

While temporal proximity may establish causation for purposes of the *prima facie* case, it does not create a genuine issue of material fact concerning whether the employer's reason for its actions is false. Importantly, any inference or presumption created by the *prima facie* case "simply drops out of the picture" once a defendant articulates a legitimate, non-discriminatory reason for its actions. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). Additionally, this Court emphasized that the *prima facie* case may be sufficient to withstand judgment as a matter of law in some circumstances, but only when "combined with sufficient evidence to find that the employer's asserted justification is false."

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 146 (2000). The temporal proximity of protected activity and termination does nothing to cast doubt on the employer's articulated legitimate, non-discriminatory reason for that termination. If a plaintiff is unable to create an issue of fact as to the truthfulness of that articulated reason, then the fact that the termination occurred close in time to the protected activity has no bearing on the pretext analysis.[2]

In her effort to manufacture a Circuit split on the temporal proximity issue, Petitioner mischaracterizes the Second Circuit's decision in *Cifra v. General Electric Co.*, 252 F.3d 205 (2nd Cir. 2001). In that case, the Second Circuit determined that twenty (20) days between the plaintiff's protected activity and her termination was sufficient to satisfy the causal connection component of her *prima facie* case of retaliation. *Id.* at 217. However, the Second Circuit then went on to discuss *additional* evidence regarding the employer's explanation for its

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[2] Here, the temporal proximity argument has even less appeal. The issues that led to Petitioner's termination first came to Respondent's attention two weeks ***before*** the alleged protected activity. A: 16-17, 335-347. Accordingly, an inference of retaliation cannot be made. *See Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001) ("where timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise"). The District Court noted this when rejecting Bennett's argument about temporal proximity. Pet., App. B, p. 11a-12a ("[H]ere the evidence supporting Verizon's non-retaliatory reason for discharging Bennett was generated before Bennett complained to Gulliford and is not disputed by Bennett.").

actions, ultimately concluding that there was a genuine issue of material fact regarding that explanation, and therefore no basis for summary judgment to the employer. *Id.* at 217-218. Thus, *Cifra* hardly stands for the proposition that temporal proximity alone can demonstrate pretext. Indeed, the Second Circuit has not yet established any precedent in that regard, but has ruled in another case that temporal proximity alone is not enough for pretext. *See* Pet., App. B, p. 12a (District Court citation to summary order in *Simpson v. New York State Dept. of Civil Servs.*, 166 Fed. Appx. 499, 2006 U.S. App. LEXIS 795 (2nd Cir. Jan. 9, 2006)).

However, the Circuits that have ruled on this question all determined that temporal proximity alone does not establish pretext. *See McCoy v. Shreveport*, 492 F.3d 551, 562 (5th Cir. 2007); *Strong v. Univ. Healthcare Sys.*, 482 F.3d 802, 808 (5th Cir. 2007); *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 981 (7th Cir. 2004); *Wascura v. City of S. Miami*, 257 F.3d 1238, 1247 (11th Cir. 2001); *Skrjanc v. Great Lakes Power Service*, 272 F.3d 309 (6th Cir. 2001); *Sprenger v. Southern Fed. Home Loan Bank of Des Moines*, 252 F.3d 1106, 1114 (8th Cir. 2001); *Pastran v. K-Mart Corp.*, 210 F.3d 1201, 1206 (10th Cir. 2000).

Based on the foregoing, there is no Circuit split on the issue of temporal proximity and pretext and therefore no compelling reason for this Court to consider that issue.

CONCLUSION

Verizon Wireless respectfully requests that the Court deny the Petition for a Writ of *Certiorari*.

Respectfully submitted,

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